95-1730 (1)

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION
AND NORM BUSSARD,
Petitioners,
v.
MICHAEL E. GREEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals had authority to create a federal common law rule that a private party's release of his right to bring a claim under the False Claims Act is invalid unless the United States has knowledge or consents, even though the False Claims Act is a comprehensive federal scheme that specifically addresses the question of settlement but does not include the rule that the Court of Appeals created.

2. Whether a settlement agreement between private parties that releases a federal cause of action implicates the sort of "uniquely federal interests" that are required to authorize a federal court to create federal common law that displaces otherwise applicable principles of state contract law.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding except those listed in the caption. Although the respondent nominally filed this action in the district court in the name of the United States, as required by 31 U.S.C. § 3730(b)(1), the United States elected not to intervene in the action pursuant to 31 U.S.C. § 3730(b)(2) and did not participate in the proceedings in either the district court or the Court of Appeals. Accordingly, the United States is not a party before this Court.

Petitioner Northrop Grumman Corporation, named as "Northrop Corporation, Inc." in the proceedings below, is a publicly traded corporation. Northrop currently has no parent corporation, nor does it have any nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Northrop Grumman Corporation and Norman Bussard respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-25a) is reported at 59 F.3d 953. The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc (App., *infra*, 37a) is unpublished. The order and the judgment of the district court granting petitioners' motion for summary judgment (App., *infra*, 26a-36a) are unpublished.

JURISDICTION

The Court of Appeals entered its judgment on July 12, 1995. App., *infra*, 1a. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on January 19, 1996.

App., *infra*, 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, is reprinted in its entirety in the Appendix to this Petition. App., *infra*, 38a-60a.

STATEMENT OF THE CASE

In 1986, respondent began employment as an investigator at petitioner Northrop Grumman Corporation's B-2 Division. In the course of his employment, he was involved in an internal investigation into whether Northrop had submitted false claims to the United States for costs associated with the procurement of "Automated Test Equipment" under Northrop's contract for the B-2 "Stealth Bomber." Shortly after respondent was terminated in October 1988, he filed an action for tortious discharge and breach of the implied covenant of good faith in the Superior Court of California. The gravamen of the action was respondent's allegation that he was terminated in retaliation for having reported to his superiors at Northrop "double charging" that he allegedly uncovered during the internal investigation. App., *infra*, 30a-31a.

On April 16, 1990, respondent, with the assistance of counsel, entered into a "Settlement Agreement and General Release," which the district court found to be "an unambiguous, integrated agreement in which he released all claims against Northrop [and] its employees" in exchange for $190,000. App., *infra*, 32a. The paragraph of the settlement agreement containing the general release provided as follows:

> Green does hereby release, acquit and forever discharge Northrop [and] its ... employees ... from any and all claims, expenses, debts, demands, costs, contracts, liabilities, rights to payment, obligations, actions and causes of action of every nature, under any theory under the law, whether common, constitutional, statutory or other of any jurisdiction, foreign or domestic whether known or unknown, whether in law or in equity, which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters from the beginning of time to the present, including, but not limited to, those actions arising out of or relating to the [tortious discharge] Action and/or Green's employment with and separation from Northrop.

Id. at 32a. The settlement agreement also expressly provided that the agreement "shall be construed in accordance with, and governed by, the laws of the State of California." C.A. Excerpts of Record 42.

After signing the release, respondent filed the present action for alleged violations of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, (the "FCA" or the "Act") against petitioner Northrop, petitioner Norm Bussard (a Northrop employee), and three other defendants. The FCA authorizes a private citizen, through the *qui tam*[1] provisions of the Act, to bring a civil action for himself and the United States for a violation of the statute. 31 U.S.C. § 3730(b)(1). Respondent alleged, as he did in the state court action, that Northrop submitted false claims to the government for costs associated with the procurement of Automated Test Equipment under the B-2 "Stealth Bomber" contract. The United States was served with the complaint as required by the Act, and, after conducting what the district court described as an "intensive investigation and study" of respondent's allegations, declined to exercise its statutory right under 31 U.S.C. § 3730(b)(2) to intervene in the action. App., *infra*, 32a-33a.

After the United States declined to intervene, petitioners moved for summary judgment on the ground that respondent's claims were barred by the release entered into in the state court action. (It was undisputed, both in the district court and in the Court of Appeals, that because the government was not a party to the state court settlement agreement, the release would not have barred the government from intervening. Indeed, it was undisputed that the release did not in any way prevent the government or any other *qui tam* relator from pursuing a separate FCA action, nor would it have prevented respondent from providing information to the government.) The district court granted petitioners' motion, holding that the release was valid and enforceable and that it barred respondent's claims. App., *infra*, 33a-35a.

The Court of Appeals for the Ninth Circuit reversed. App., *infra*, 1a-25a. The court assumed the correctness of the district court's finding that, by entering into the release as part of the settlement of the state court action, respondent had bargained away his right to bring a *qui tam* action. It nonetheless held that respondent's prefiling

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[1] The term "*qui tam*" literally means "who as well." *Black's Law Dictionary* 1251 (6th Ed. 1990).

release was unenforceable. *Id.* at 4a-5a & n.3. Although it acknowledged that the statute was silent on the subject of prefiling releases, the court held as a matter of "federal common law," that "prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Id.* at 24a.

The Court of Appeals first rejected petitioners' argument that because the FCA created a detailed and comprehensive federal statutory scheme, including provisions addressing settlements entered into *after* an FCA claim is filed, the court could not read into the Act a non-textual bar on *pre*filing releases, as respondent urged. App., *infra*, 7a-9a.[2] Instead, the court concluded that, although the FCA is detailed and comprehensive, Congress' silence on the particular subject of the validity of *pre*filing releases meant that the court could decide this question as a matter of federal common law. *Id.* at 8a-9a.

In reaching this conclusion, the court offered three reasons for distinguishing this Court's decision in *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048, 2054 (1994), which had held that federal courts should not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." First, the court stated that *O'Melveny* "did not purport to overrule" this Court's decision in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), which the court interpreted as authorizing the creation of a federal common law of releases. App., *infra*, 9a-10a n.4. Second, the court concluded that because *O'Melveny* was based upon Supreme Court precedents that pre-dated Ninth Circuit authority on this issue, *O'Melveny* should not be read to undercut existing Ninth Circuit law. *Id.* On this basis, the court held that *O'Melveny* did not preclude the creation of a federal common law rule, even in the case of a comprehensive and detailed federal statute, where a state law rule "would conflict with specific policies of a comprehensive federal scheme." *Id.* Finally, the court concluded that *O'Melveny*'s "concern that courts will undercut a balance struck by Congress" was inapplicable here, because "unlike other contexts in

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[2]The FCA contains detailed provisions governing the filing, conduct, and settlement of private *qui tam* actions. App., *infra*, 38a-60a. As the Court of Appeals explained in detail, the specific provisions relating to settlement of a private *qui tam* action apply only *after* it is filed. App., *infra*, 7a-8a.

which formulating a federal common law rule would require courts to create enforcement mechanisms that Congress might not have intended, formulating a rule to assess the validity of a release merely involves protecting those rights that Congress *did* create." *Id.* (emphasis in original).

The court then applied a balancing test to determine whether the content of federal common law should be determined by incorporating state law (which the court acknowledged likely would have upheld the release) or by creating a new federal rule governing releases. The court declared that because the interest in settling disputes is "present in every case," the party seeking to uphold a release should be required to "advance some important interest in addition to the interest in settlement." App., *infra*, 12a-13a. The court also stated that applying state law to uphold a release would impair the federal interest in "uniformity" in that it might be possible for parties to use choice-of-law clauses in their settlement releases to select the state law most likely to uphold the release. *Id.* at 11a. Finally, the court concluded that upholding a prefiling release would conflict with the FCA's general policy of " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits' " under the FCA, *id.* at 14a-15a, and would increase the likelihood that the government would not learn about fraud allegations. *Id.* at 17a-21a. Based upon these policy concerns, the Ninth Circuit engrafted onto the FCA a "federal common rule" that prefiling releases, "when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." *Id.* at 24a. Applying this new common law rule, the court of appeals reversed the district court's judgment.

Petitioners petitioned for rehearing, and suggested rehearing en banc, on the ground that the Court of Appeals' decision conflicted with *O'Melveny* and with this Court's intervening decision in *United States v. Mezzanatto*, 115 S.Ct. 797, 801 (1995), which held that "absent some affirmative indication of Congress' intent to preclude waiver," the proper presumption is "that statutory provisions are subject to waiver by voluntary agreement of the parties." 115 S.Ct. at 801. On January 19, 1996, the Court of Appeals denied the petition and rejected petitioners' suggestion for rehearing en banc. App., *infra*, 37a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals held that it had the authority under "federal common law" to invalidate a state court settlement agreement to the extent that it released a claim under the FCA without the government's knowledge or consent. This holding is contrary to the decisions of this Court — and conflicts with decisions from other circuits — in at least two respects.

First, the fact that the FCA is a detailed and comprehensive statutory scheme that includes provisions concerning settlement of FCA claims precludes the federal courts, under this Court's decisions in *O'Melveny* and *Mezzanatto*, from imposing additional federal common law restrictions on the waiver of FCA claims. The Court of Appeals' contrary conclusion, which was based in part on the view that its pre-*O'Melveny* case law survived this Court's reversal of the Ninth Circuit in that case, also conflicts with the approach applied by the D.C. Circuit and the Third and Eighth Circuits. These circuits have correctly recognized that, when a federal statutory scheme is comprehensive and detailed, *O'Melveny* categorically prohibits a court from creating a federal common law rule of decision to cover matters that Congress chose not to address.

Second, even assuming *arguendo* that the language and structure of the FCA did not preempt the creation of a federal common law rule, the Court of Appeals erred. This Court's decisions make clear that the content of such a rule must be determined by incorporating state law, unless (at a minimum) application of the state rule implicates one of a very narrow range of "uniquely federal interests" such as admiralty, the authority and duties of the United States, and disputes among States or with foreign nations. The Court of Appeals disregarded this important and well-settled limitation on its federal common law power by failing to recognize that there is no "uniquely federal interest" in a private party's release of a federal cause of action. In particular, there was no uniquely federal interest here because the right of the federal government to bring an action under the FCA was in no way affected by the release. The Ninth Circuit's analysis also conflicts with decisions from the Third and Fifth Circuits, which have declined to displace state law in evaluating the validity of settlements precisely because there was no substantial federal interest.

In addition to the conflict with decisions of this Court and of other Courts of Appeals, there are other substantial reasons why review of

the decision below is warranted. For several years, the lower courts have been in disarray over the general question whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements releasing federal claims, and this case provides an appropriate vehicle for providing much-needed guidance on that issue.

Finally, the ruling below, in addition to usurping a decision that properly belongs to Congress, will make it significantly more difficult for federal contractors throughout the Ninth Circuit to reach conclusive settlements of employment disputes.

For all of these reasons, which are discussed in detail below, review by this Court is warranted.

A. Congress, By Enacting The False Claims Act, Preempted The Application Of Federal Common Law In The Area

1. This Court Has Made Clear That Federal Courts Do Not Have Authority To Create Federal Common Law Where Congress Has Comprehensively Legislated

"The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). In our federal system of separation of powers, which creates a "division of functions between the Congress and the federal judiciary," *id.* at 313, and accords to Congress the "exclusive province . . . to formulate legislative policies," *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978), "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee v. Illinois*, 451 U.S. at 317.

Although the creation of federal common law by the courts may be a "necessary expedient" in some limited circumstances in the absence of legislation, this Court's precedents make clear that "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. at 314. *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 367

(1943) (federal common law is resorted to only "[i]n the absence of an applicable Act of Congress"). Even in those few areas where the Court has traditionally created federal common law in the absence of legislation — such as disputes between States, which "frequently call for the application of a federal rule when Congress has not spoken," *Milwaukee v. Illinois*, 451 U.S. at 315, n.8, or admiralty law, *see Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) — this Court has recognized that Congress is in a superior constitutional position than are the courts to enact the substantive federal law governing the dispute. Thus, where Congress has enacted comprehensive legislation in an area, the Court has held that Congress' "decision controls," to the exclusion of common law that pre-existed the statute or that might properly have been created by the federal courts in the absence of the statute. *Milwaukee v. Illinois*, 451 U.S. at 315, n.8. *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981) ("[t]he Court also has recognized a responsibility, *in the absence of legislation*, to fashion federal common law in cases raising issues of uniquely federal concern") (emphasis added). Accordingly, when a court, construing federal legislation and applying the traditional canons of statutory construction, determines that Congress has "sp[oken] directly to a question," the court's task is at an end; the court is not free to impose a supplemental or different rule than that provided for by Congress. *Mobil Oil*, 436 U.S. at 625. For purposes of precluding courts from creating federal common law in an area, the question is *not* whether Congress explicitly has proscribed the use of federal common law, but simply whether it has enacted detailed and comprehensive legislation. *Milwaukee v. Illinois*, 451 U.S. at 315.

Nor is it appropriate for courts to create federal common law simply because Congress has not answered the precise question of the availability of a particular right, remedy, or rule of decision. In *Mobil Oil*, for example, this Court held that federal courts were not free to fashion a federal common law rule of recovery in admiralty for "loss of society" where the federal legislation in the area, the Death on the High Seas Act, did not address that question. 436 U.S. at 625. The Court reasoned that Congress, in enacting the legislation, had prescribed specific rules on many aspects of recovery, including a limitations period, survival, contributory negligence, and damages. *Id* at 625-26. Because Congress had comprehensively prescribed procedures and remedies for claims under the Act, there simply was no

room for the courts to create additional law on the subject, even though admiralty is an area in which federal courts historically have fashioned common law in the absence of legislation. *Id.*; *see also Tennessee Valley Authority*, 437 U.S. at 194 (once Congress has "decided the order of priorities in a given area," the judicial role "comes to an end").

This Court recently applied these principles in *O'Melveny*, a case involving the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). In *O'Melveny*, the Ninth Circuit had held as a matter of federal common law that wrongful conduct that could have formed a defense against a bank in receivership would not be imputed to the FDIC as receiver. *FDIC v. O'Melveny & Myers*, 969 F.2d 744, 751-52 (9th Cir. 1992). This Court reversed, holding that there was no basis for displacing California law on that subject with judge-made federal law. *O'Melveny*, 114 S.Ct. at 2054. In light of the "comprehensive" provisions of FIRREA itself, including provisions specifically creating federal statutory rules of decision "regarding claims by, and defenses against, the FDIC as receiver," the Court refused to look beyond the terms of FIRREA to displace state law. *Id.* Courts should not "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed" because "matters unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* Applying the canon "*[i]nclusio unius, exclusio alterius*," the Court looked to the specific statutory exceptions to the rule that the FDIC " 'steps into the shoes' of the failed S & L," and concluded that "[t]o create additional 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* Under *O'Melveny* and this Court's other precedents, where Congress has enacted a detailed and comprehensive federal statutory scheme, the existence of that federal legislation displaces federal judicial power to create federal common law.

2. The Court Of Appeals' Analysis Is Fundamentally At Odds With This Court's Precedents Holding That If Congress Has Spoken On A Subject, There Is No Room For Federal Common Law

The Court of Appeals acknowledged — as it had no choice but to do[3] — that the FCA is a detailed and comprehensive federal statutory scheme. App., *infra*, at 7a-8a & 9a-10a n.4. It also recognized that the FCA contains several provisions specifically addressing the question of settlements of *qui tam* actions. *Id.* at 7a-8a. Conspicuously absent from this detailed statutory scheme, however, is *any* provision saying that settlement of a *qui tam* claim before an action is filed must be reported to the government in order to be valid. *Id.* at 7a (noting that the Act is "silent" on this subject). Nonetheless, and notwithstanding this Court's decision in *O'Melveny*, the Ninth Circuit held that federal common law is authorized if the court finds that a state rule "would conflict with specific policies of a comprehensive federal scheme." *Id.* at 10a n.4. The court went on to conduct an extensive balancing of what it perceived to be the relevant state and federal interests involved, and arrived at a rule of its own making invalidating general settlement agreements to the extent that they release a claim under the FCA "without the United States' knowledge or consent." *Id.* at 13a-24a. This conclusion is directly contrary to the Court's clear holding, in *O'Melveny* and other cases, that a "comprehensive and detailed" federal statute may not be supplemented by federal common law.

The court's holding appears to have been erroneously predicated upon a separate section of this Court's opinion in *O'Melveny* that discusses the applicable principles governing the use of federal common law in the *absence* of comprehensive regulation. App., *infra*, 10a n.4. (citing *O'Melveny*, 114 S.Ct. at 2055). In the cited part of the *O'Melveny* opinion, this Court discussed whether federal common law could be invoked "assuming the *inapplicability* of FIRREA" — an exercise that was necessary only because the events in question took place prior to the enactment of FIRREA and it was unclear whether

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[3] In *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 213 (9th Cir. 1991), another panel of the Ninth Circuit had held unequivocally that the FCA is a "comprehensive legislative scheme" such that the court was precluded from supplementing the remedies provided for in the Act with federal common law rights of contribution and indemnity.

the statute was retroactive. 114 S.Ct. at 2055 (emphasis added). By contrast, the *first* part of the Court's *O'Melveny* opinion, discussed above, assumed the *applicability* of FIRREA, and makes clear that where a comprehensive federal statutory scheme does exist, a federal court may *not* engage in the balancing of policies called for by the "significant conflict" analysis that would apply in the absence of legislation. 114 S.Ct. at 2054-55.

Given the comprehensive nature of the FCA, the court should have recognized that additional federal common law on the matter of settlements was preempted. *O'Melveny*, 114 S.Ct. at 2054-55. The court's use of the "significant conflicts" test discussed in the second part of *O'Melveny* as a basis for adding to this statutory scheme a new "federal common law" rule that it thought balanced the relevant incentives more effectively than what was enacted by Congress flies in the face of *O'Melveny* and this Court's other precedents. *See Northwest Airlines*, 451 U.S. at 97; *Milwaukee v. Illinois*, 451 U.S. at 319; *Mobil Oil Corp.*, 436 U.S. at 625.

In its opinion, the Ninth Circuit purported to distinguish this Court's precedents as standing only for the narrow principle that where Congress has provided mechanisms for *enforcement* of a statute, the courts should not imply new causes of action or "additional remedies." App., *infra*, 8a-9a & 10a n.4. The court thought that this narrow principle would not be transgressed by a judicially-created rule that would "protec[t] those rights that Congress *did* create" by "prevent[ing] parties from releasing the remedy without first obtaining the government's consent." *Id.* (emphasis in original).

The Ninth Circuit's analysis disregards *O'Melveny*, which did *not* involve a proposed new cause of action or remedy, but rather a question of imputation of a defense. As *O'Melveny* makes clear, the principle that federal courts should not make "federal common law" to supplement a federal statutory scheme is *not* limited to the creation of new claims or remedies. This Court has limited the power to create federal common law to cases where there is an "absence of legislation," *Northwest Airlines*, 451 U.S. at 95, precisely because it is for *Congress* to effect the balancing of incentives that it believes proper in fulfilling the legislative function of "decid[ing] the order of priorities in a given area." *Tennessee Valley Authority*, 437 U.S. at 194. That fundamental limitation on the judicial function is *not*, as the Ninth Circuit thought, restricted to the question of remedies, *see O'Melveny*,

114 S.Ct. at 2054, nor is it suspended when the court thinks that a proposed rule of "federal common law" might further the policies that it thinks animate the federal statutory scheme.

The Ninth Circuit's further ground for distinguishing *O'Melveny, Northwest Airlines*, and this Court's other cases was that they did not "purport to overrule" *Dice v. Akron*, 342 U.S. 359 — a case that the court read as authorizing the creation of "federal common law" to assess "the validity of a release." App., *infra*, 9a-10a & n.4. But even assuming that *Dice* stands for that proposition (an erroneous assumption, as discussed below), the *most* that *Dice* could be read to have done is to require that a release of certain federal statutory rights be *voluntary* to be enforceable. *See Dice*, 342 U.S. at 362 ("a release of rights under the [Federal Employers' Liability] Act is void when the employee is induced to sign it by . . . deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release"). Accordingly, not even the Ninth Circuit's broad reading of *Dice* — and certainly nothing in this Court's other precedents — could support the creation of a "federal common law" rule of the fundamentally legislative character that the court adopted here.

3. The Ninth Circuit's Analysis Conflicts With Holdings Of The Other Courts of Appeals

The Ninth Circuit's erroneous reading of *O'Melveny* also places it in conflict with the District of Columbia Circuit and the Third and Eighth Circuits, which have held that where a comprehensive and detailed federal statutory scheme exists, any question involving the statute must be answered by the statute itself, or, in the case of a matter "unaddressed" by the statute, from state law.

In *A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454 (D.C. Cir. 1995), the District of Columbia Circuit considered the application of *O'Melveny* to the Edge Act, 12 U.S.C. § 611, *et seq.*, which provides certain standards of liability for international banking corporations. Having found that the Act did not address the specific question presented in the case, *i.e.*, the applicable statute of limitations in a claim brought under the Act, the court concluded that it had no power to create federal common law in the area. The court reasoned that, because the Edge Act is a detailed statutory scheme within the meaning of the first part of the *O'Melveny* decision, the court could not use the statute's silence on a particular issue as "an

invitation to the federal courts to conjure up a 'federal common law untethered to a genuinely identifiable (as opposed to a judicially constructed) federal policy.'" 62 F.3d at 1460 (quoting *O'Melveny*, 114 S.Ct. at 2055).

The D.C. Circuit reached a similar result in *Murphy v. FDIC*, 61 F.3d 34 (D.C. Cir. 1995), which addressed an area of federal common law that later was occupied by a detailed statutory scheme. The specific question in *Murphy* was whether the federal common law defense that this Court recognized in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) (adopting a federal common law rule that the FDIC as receiver of a failed bank is not bound by an unwritten "side agreement" by the bank not to enforce a note), was eliminated when Congress enacted FIRREA, which comprehensively regulated the rights of the FDIC as receiver of a failed banking institution. The Court of Appeals held that the basis for this defense was eliminated, reasoning that, under the logic of *O'Melveny*, there simply was no room for federal common law in the context of FIRREA's detailed statutory scheme, including the pre-FIRREA federal common law defense created by *D'Oench, Duhme*. The court took the holding of *O'Melveny* to be that, because specific provisions of FIRREA recognize certain defenses to enforcement but not others, the possibility of other federal common law defenses necessarily was eliminated thereby under the doctrine "'*[i]nclusio unius, exclusio alterius.*'" 61 F.3d at 39 (quoting *O'Melveny*, 114 S.Ct. at 2054). The court concluded that the inclusion of specific defenses in the statute — including one that resembled but was not identical to the defense created in *D'Oench, Duhme* — "implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute — of which the *D'Oench* doctrine is one." 61 F.3d at 39.

Significantly, in neither *A.I. Trade* nor *Murphy* did the D.C. Circuit engage in the "significant conflicts" analysis set forth in the part of the *O'Melveny* opinion that applies to situations where no comprehensive legislation exists — the source of the Ninth Circuit's error in this case. Rather, in both cases the court did what *O'Melveny* instructs: it looked to the statute, found that the statute was a detailed and comprehensive expression by Congress of what federal law should exist in the relevant area, and concluded that there was no room for judicial lawmaking through the mechanism of "federal common law." *A.I. Trade*, 62 F.3d at 1459-60; *Murphy*, 61 F.3d at 39.

Two other Courts of Appeals have followed the D.C. Circuit's approach in *A.I. Trade* and *Murphy*. In *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank*, 69 F.3d 1398 (8th Cir. 1995), the Eighth Circuit agreed with the D.C. Circuit that where Congress has legislated in an area through a detailed statutory scheme, the first step of *O'Melveny* precludes any application of federal common law by way of a "conflicts" analysis of the sort employed by the Ninth Circuit here. *DiVall* was a declaratory relief action brought by the maker of a promissory note who sought to have the note declared invalid on the ground that it lacked consideration. The district court held that the FDIC (from which the holder had acquired the note) was a federal common law "holder in due course," despite contrary state law, and that it also was protected by the federal common law defense recognized in *D'Oench, Duhme*. The Eighth Circuit reversed, holding that under *O'Melveny*, the existence of a comprehensive statutory scheme such as FIRREA barred the courts from creating additional federal common law defenses in the same area. *DiVall*, 69 F.3d at 1402. The court declined to entertain any further considerations in favor of federal common law: "If [the holder's] defense is to be barred, it must be barred either by a specific provision of FIRREA or by state law." *Id.* at 1402-03. Like the D.C. Circuit, the Eighth Circuit did *not* engage in the "significant conflicts" analysis that *O'Melveny* and this Court's other precedents reserve for situations in which no federal legislation exists — and that the Ninth Circuit improperly employed here.

The Third Circuit also has followed the approach set forth in *O'Melveny* and applied by the D.C. Circuit and the Eighth Circuit. In *RTC v. W.W. Development & Management, Inc.*, 73 F.3d 1298, 1308 (3d Cir. 1996), the Third Circuit held that " 'matters left unaddressed' " in FIRREA " 'are presumably left subject to the disposition provided by state law' " under *O'Melveny*. Once again, the court did *not* engage in the "significant conflicts" analysis that *O'Melveny* said applies only in the absence of a comprehensive statute. *See also Dimuzio v. RTC*, 68 F.3d 777, 780 n.2 (3d Cir. 1995) (suggesting that *D'Oench, Duhme* defense may no longer be available, citing *O'Melveny* and *Murphy*).

Even apart from the conflict discussed above, the Ninth Circuit is in conflict with the D.C. Circuit on a related question as well: the effect of comprehensive legislation on a previously existing federal common law rule. In its opinion here, the Ninth Circuit purported to

distinguish *O'Melveny* on the ground that federal common law rules governing releases have existed for some time, App., *infra*, 9a-10a & n.4 (citing *Dice*), and that nothing in *O'Melveny* specifically indicated an intention to change that rule, *id.* The D.C. Circuit in *Murphy* rejected a nearly identical argument that *O'Melveny* prohibited only the creation of new common law, and that because it did not specifically mention *D'Oench, Duhme*, the federal common law rule recognized in that case was unaffected. 61 F.3d at 40. The D.C. Circuit reasoned that this view directly contradicted this Court's precedents regarding "the impact of comprehensive new legislation upon existing federal common law." *Id.* (citing *Milwaukee v. Illinois*, 451 U.S. at 314-15). The court concluded that, under *O'Melveny* and *Milwaukee v. Illinois*, a court may *not* rely upon pre-existing federal common law to supplement a later-enacted federal statutory scheme. Rather, because Congress has legislated in the area, "'the need for such an unusual exercise of lawmaking by federal courts disappears.'" 61 F.3d at 40 (quoting *Milwaukee v. Illinois*, 451 U.S. at 314).

The Ninth Circuit's reasoning here conflicts directly with the D.C. Circuit's analysis in *Murphy*. Here, the Ninth Circuit looked to *Dice*, a case decided long before the modern FCA, as a source of federal common law to invalidate a release of an FCA claim. But however *Dice* may be understood where there is no comprehensive federal statute, a question discussed below, here Congress has enacted a detailed and comprehensive statutory scheme that *specifically addresses the question of settlements. See supra* note 2. As the D.C. Circuit recognized in *Murphy*, the competence of the judiciary to fashion a federal rule in a given area simply disappears when Congress has addressed the subject so comprehensively. 61 F.3d at 39.

4. The Ninth Circuit's Creation Of A Rule That Claims Under The FCA May Not Be Waived Conflicts With This Court's Decision In *United States v. Mezzanatto*

Even apart from this Court's decision in *O'Melveny*, the Ninth Circuit's approach was flawed. The court's use of federal common law to fill a perceived "gap" in the FCA overlooks the fact that the answer to the court's question was readily available by reference to the statute itself. In construing a statute, the court should apply any pertinent canon of statutory construction to help determine the meaning of the text as well as the significance, if any, of Congress' failure to address a particular issue. Here, the Court of Appeals failed to apply the well-

established background principle of construction that federal statutory rights are presumed waivable, explained most recently in this Court's decision in *Mezzanatto*, 115 S. Ct. at 801.

In *Mezzanatto*, the question was whether rights under Federal Rule of Evidence 401 and Federal Rule of Criminal Procedure 11(e)(6) could be waived. 115 S.Ct. at 800. Neither rule spoke directly to the subject, and the Ninth Circuit determined that to permit a waiver in light of Congress' silence would require the court " 'to write in a waiver in a waiverless rule.' " *Id.* at 801 (citation omitted). This Court reversed, holding that "[t]he Ninth Circuit's analysis is directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions," which is that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Id.*

The presumption that all federal statutory rights may be waived unless Congress directs otherwise is a background rule of construction against which all federal statutes must be read. *Mezzanatto*, 115 S.Ct. at 803. Accordingly, when a statute is "silent" as to the waivability of a particular right, as the Ninth Circuit found to be the case here, App., *infra*, 7a, the proper interpretation of that silence is that the statutory rights in question "are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 115 S.Ct. at 803.

It is undisputed that the release in question here affects only respondent's own rights and in no way affects the right of the United States government or any other *qui tam* relator to bring claims against petitioners under the FCA. Under *Mezzanatto* and the long line of cases that it follows, respondent's own right to bring a claim against petitioners under the FCA and to recover proceeds from such a claim was subject to voluntary waiver by virtue of the background rule that in the absence of an express statement to the contrary, a federal statute conferring rights is presumed to permit waiver of those rights. The Ninth Circuit's contrary presumption that Congress' "failure to resolve the question expressly" may be read as a "desire to leave resolution of the issue to the courts," App., *infra*, 9a, is flatly contrary to this Court's clear precedents. *Mezzanatto*, 115 S.Ct. at 801.

B. The Court of Appeals Erred In Creating A Federal Common Law Of Releases Where There Is No "Uniquely Federal Interest" That Would Warrant Displacing Applicable State Law

1. This Court's Precedents Make Clear That The Power Of The Federal Courts To Displace State Law In Favor Of A Uniform, Federal Common Law Of Decision Is Narrowly Circumscribed

It is well-settled that "'[t]here is no federal general common law.'" *O'Melveny*, 114 S.Ct. at 2053 (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines*, 451 U.S. at 95. Thus, where a rule of decision is needed and the answer is not provided by a federal statute, federal courts generally are not free to fashion their own common law rules. Rather, because Congress is presumed to legislate "'against the background of the total *corpus juris* of the states,'" *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966) (quoting Hart & Wechsler, The Federal Courts and the Federal System 435 (1953)); *see also Burks v. Lasker*, 441 U.S. 471, 478 (1979), state law presumptively fills the interstices of a federal statutory scheme and also presumptively governs in the absence of federal legislation. *O'Melveny*, 114 S.Ct. at 2054; *Kamen v. Kemper Fin'l Serv., Inc.*, 500 U.S. 90, 98 (1991).

Moreover, because "the federal lawmaking power is vested in the legislative, not the judicial, branch of government," *Northwest Airlines*, 451 U.S. at 95, it is for Congress, not the courts, to decide when and to what extent "latent federal power should be exercised to displace state law." *Wallis*, 384 U.S. at 68. This principle reflects a judgment not only about the appropriate separation of powers, see *Milwaukee v. Illinois*, 451 U.S. 304 at 312-13; *see also United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947), but also about the relative competence of federal courts to make the sort of determinations required, *see, e.g., Bush v. Lucas*, 462 U.S. 367, 390 (1983); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981).

Accordingly, the power of federal courts to displace state law with judge-made "federal common law" is sharply circumscribed and is warranted only in "extraordinary cases." *O'Melveny*, 114 S.Ct. at 2056; *see also Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (noting that such cases are "'few and restricted'"). Of course, where Con-

gress or the Constitution affirmatively has prescribed controlling federal standards, federal courts are empowered to give meaning to those standards through "a process of case-by-case judicial decision in the common law tradition," — and to set aside contrary state law in doing so. *Northwest Airlines*, 451 U.S. at 95.[4] But except where "Congress has given the courts the power to develop substantive law," a federal court may not displace a nondiscriminatory[5] state law in favor of a judge-made federal rule unless application of the state rule implicates "uniquely federal interests" *and* would significantly conflict with an specific, concrete federal policy that reflects those interests. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-08 (1988); *see also O'Melveny*, 114 S.Ct. at 2055; *Texas Industries*, 451 U.S. at 640; *Wallis*, 384 U.S. at 68.

These limitations on the power of a federal court to set aside state law in favor of a judge-made federal rule apply with full force where state law operates to fill the interstices of a federal scheme. Even in an area of law that has been described as "necessarily federal in character," *Kamen*, 500 U.S. at 97, or "entirely governed by federal law," *Boyle*, 487 U.S. at 507 n.3, the "common law" interstices of that federal law will be determined by borrowing or incorporating state law "except where a significant conflict with federal policy exists." *Id.*; *see*

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[4] As explained earlier, the rules of law contained in a federal statute must be construed in light of the applicable *federal* canons of construction and background principles of law. Thus, for example, this Court has consistently held that the scope of 42 U.S.C. § 1983 must be construed in light of the background principles of common law against which it was enacted. *See, e.g., Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Pulliam v. Allen*, 466 U.S. 522, 529-36 (1984). Once the task of statutory construction is completed, however, and the affirmative scope of the statute has been delineated, state law fills the remaining interstices.

[5] The presumption that Congress legislates with the expectation that its laws will be construed against the *corpus juris* of the States would not, of course, apply to a state law that facially discriminates against federal interests, *see, e.g., United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595-96 (1973), or to "aberrant" laws that define a particular term " 'in a way entirely strange to those familiar with its ordinary usage.' " *Id.* (quoting *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956)); *see also United States v. Kimbell Foods*, 440 U.S. 715, 736 n.37 (1979). Of course, this exception is inapplicable here because the state law at issue involves contract principles of "general applicability." *Id.*

also O'Melveny, 114 S.Ct. at 2053-54; *Kamen*, 500 U.S. at 98; *United States v. Yazell*, 382 U.S. 341, 352 (1966).

2. The Court Of Appeals' Displacement of State Contract Law Conflicts With This Court's Clear Precedents

The Court of Appeals departed from these settled principles in two critical respects. First, the court ignored the preliminary issue whether "uniquely federal interests" are implicated by the validity of a global agreement that releases both state and federal claims. Second, as a consequence of its failure to identify the uniquely federal interest at stake, the court failed to recognize that state law may be displaced only if it presents a significant conflict with a specific, concrete federal policy that reflects such an interest. Under the applicable standards set forth in this Court's decisions, no such uniquely federal interest exists in private contracts settling federal statutory claims — contracts that, like all other private agreements, are presumptively governed by state law.

By failing to consider — much less identify — whether any "uniquely federal interest" was at stake, the Ninth Circuit circumvented the primary constraint established by this Court against "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny*, 114 S.Ct. at 2055. That is, the elimination of the threshold requirement of a uniquely federal interest would permit federal judges to displace state law whenever they are of the view that it would conflict with a judicially perceived "policy" embodied in a federal statute — precisely what the Ninth Circuit did in this case.

As noted earlier, this Court has made clear that judicial authority to displace state law with a federal rule of decision exists only in two limited circumstances: where "Congress has given the courts the power to develop substantive law" and where "a federal rule of decision is 'necessary to protect uniquely federal interests.' " *Texas Industries*, 451 U.S. at 640 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). The first of these categories is, of course, inapplicable here; no one in this case has contended (or could contend) that Congress, in enacting the FCA, has affirmatively conferred a common-law authority to prescribe substantive law. *Cf. Texas Industries*, 451 U.S. at 642-43 ("this Court has read § 301(a) of the Labor Management Relations Act . . . as vesting in the courts the power to develop a common law of labor-management relations")

(citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)). Accordingly, the identification of a "uniquely federal interest" was a "necessary . . . condition for the displacement of state law" in this case. *Boyle*, 487 U.S. at 507; *Texas Industries*, 451 U.S. at 640; *Northwest Airlines*, 451 U.S. at 95; *Yazell*, 382 U.S. at 352. The Ninth Circuit committed a clear and categorical error by failing to identify a uniquely federal interest that was implicated in this case.[6]

Moreover, it is clear that no such interest can be identified here. The range of interests that are sufficiently important to warrant judicial creation of federal substantive law without congressional authorization are "few and restricted." *Wheeldin*, 373 U.S. at 651. This Court, in *Texas Industries*, summarized the limited areas in which federal common law controls as follows:

> [A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, *either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.*

Texas Industries, 451 U.S. at 641 (emphasis added; footnotes and citations omitted); *see also Northwest Airlines*, 451 U.S. at 95; *Illinois v. Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (federal common law

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[6] The Ninth Circuit seemed to think that this Court's decision in *Kimbell Foods, supra*, established a "three-part test" in which the most important factor was " 'whether application of state law would frustrate specific objectives of the federal program.' " App., *infra*, 9a-11a (quoting *Kimbell Foods*, 440 U.S. at 728-29). However, as this Court made clear in *Boyle*, *Kimbell Foods* did not establish a different standard, despite its different choice of language: A state law " 'frustrates specific objectives' of federal legislation" only if it "significant[ly] conflict[s]" with an "identifiable federal policy or interest." 487 U.S. at 507 (quoting *Kimbell Foods*, 440 U.S. at 728; other citations and internal quotation marks omitted). Moreover, *Boyle* makes clear that, in addition to this showing, it is a "necessary . . . condition for the displacement of state law" that there be a "uniquely federal interest" implicated by the state law. *Id.*

applies "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism"); *Standard Oil Co.*, 332 U.S. at 307 (federal common law applies to those matters "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition").[7]

Although the Court of Appeals erred by failing explicitly to address the question whether there was a "uniquely federal interest" at issue in this case, its opinion can be read implicitly to suggest that the release of a federal cause of action is a sufficiently important federal interest to warrant displacement of any state law that a federal court concludes "would frustrate the policies underlying" that cause of action. App., *infra*, 11a. Thus, after first asserting that " '[f]ederal law always governs the validity of releases of federal causes of action,' " *id.* at 9a (quoting *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986) (citing *Dice v. Akron*, 342 U.S. at 361)), the court declared in a footnote that "under our decision in *Mardan*, federal common law *ordinarily* would displace state law" on this subject. App., *infra*, 10a n.4 (emphasis added).[8] The court argued that what it termed *O'Melveny*'s "*dicta*" concerning the interstitial use of state law was inapplicable here because, where the release of a federal claim is at issue, "the potential that state law might impair federal rights is substantial." *Id.* at 10a n.4 (citing *Dice*, 342 U.S. at 361).

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[7] Consistent with *Texas Industries*, the Court also has held that state laws imposing liability on a party for complying with the terms of a federal procurement contract also implicate "uniquely federal interests." *Boyle*, 487 U.S. at 504-07 (holding that state laws imposing "civil liabilities arising out of the performance of federal procurement contracts" implicate a "uniquely federal interest"); *O'Melveny*, 114 S.Ct. at 2055 (laws that "govern the primary conduct of . . . [government] contractors"). *Boyle* falls squarely within *Texas Industries*' general rule: State regulation of contract specifications that have been approved by the Federal Government plainly implicates "the authority and duties of the United States as sovereign." *Texas Industries*, 451 U.S. at 641.

[8] Although the court stated that this conclusion was required "under our decision in *Mardan*," it more closely resembles the views of the dissenting judge in *Mardan* (who was a member of the panel in this case): "At the very least, the fact that federal law governs here creates a presumption against incorporation of state law in the absence of convincing justification." 804 F.2d at 1463 (Reinhardt, J., dissenting).

To the extent that the Ninth Circuit's opinion can be read to suggest that a settlement agreement releasing a federal claim is a "uniquely federal interest," the court plainly erred. A release of a federal claim in a contract between private parties — particularly one that settles both state and federal claims in a *state* court action — hardly can be said to involve "the authority and duties of the United States as sovereign" or a controversy of an "interstate or international nature." *Texas Industries*, 451 U.S. at 641. In this respect, it is important to recognize that the legal rights of the United States are in no way infringed or compromised by a *prefiling* settlement. *Cf. id.* (noting that there is a "uniquely federal interes[t]" in "the rights and obligations of the United States"); *Clearfield Trust*, 318 U.S. at 366-67. In the prefiling context, the government is not bound by the employee's release of a *qui tam* claim because the employee is in no sense acting on the government's behalf.

Because the legal rights of the Government are not affected by the prefiling release of a *qui tam* claim, any assertion that a "uniquely federal interest" exists in a private settlement contract must be based on the more general interest in advancing the purposes of the federal statutory scheme that conferred the federal cause of action. That appears to have been the approach implicitly adopted by the Ninth Circuit in this case: The court purported to distinguish *Texas Industries* on the ground that judicial creation of federal rules governing releases of federal claims would not require the court to "engage in a task more appropriately left for the legislature" because "formulating a rule to assess the validity of a release merely involves protecting those rights that Congress *did* create." App., *infra*, 10a n.4 (emphasis in original). This argument, however, is squarely foreclosed by *Texas Industries* itself, in which the Court declined to create a federal common law right to contribution among joint antitrust violators because it concluded that the general interest in enforcing a federal statute is not the sort of "uniquely federal interest" that warrants the creation of new judge-made federal law:

> Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in

> the absence of statutory authority. In short, contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

Texas Industries, 451 U.S. at 642 (citation omitted).

Moreover, it is apparent that the Ninth Circuit's creation of new federal law that it believed would further the purposes of the statutory scheme implicates precisely the sort of concerns identified in *Texas Industries* about judicial usurpation of the legislative function. The court's decision to bar prefiling releases absent the government's consent rests not only on highly debatable policy judgments[9] but also on dubious factual suppositions.[10] The decision whether to set aside state law, which otherwise would govern such releases, rests with Congress.

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[9]For example, the court erroneously discounted the value of prefiling settlements by asserting that the FCA's "concer[n] with deterring frivolous suits" is "not implicated when the relator chooses not to file." App., *infra*, 17a. That gets it exactly backwards: Where the relator chooses not to file a frivolous suit because of a prefiling settlement, the agreement has *accomplished* the statutory purpose of "deterring frivolous suits."

The court also erred in requiring petitioners to articulate some interest *other* than finality that is served by global settlement agreements. App., *infra*, 12a-13a. The court based this requirement on the view that, because the interest in finality is present in every case involving a settlement, a tie-breaker is needed when there is a substantial interest favoring nonenforcement. *Id.* But there is no reason, either in law or logic, why interests must be weighed ordinally ("two interests versus one interest"), and no reason why ties must go against enforcement merely because that weighty interest is present in every case.

Similarly erroneous is the court's conclusion that the FCA's policy of encouraging *qui tam* actions continues to exist even where (as here) the allegations have been publicly disclosed in state court litigation. App., *infra*, 18a-20a & n.11. The court reasoned that, in such cases, the statutory purpose of notifying the government has not necessarily been accomplished, but Congress apparently saw the matter differently: Allegations that have been publicly disclosed generally may not be the basis of a *qui tam* action by anyone other than the original source, regardless of whether the government can be shown not to have been aware of the information. 31 U.S.C. § 3730(e)(4)(A).

[10]For example, the sheer volume of *qui tam* cases that have been filed belies the court's assertion that failing to ban prefiling releases will make it impossible to "ensure that potential relators remain." App., *infra*, 21a.

(Footnote continued)

To the extent that the Ninth Circuit suggested that this Court's decision in *Dice* authorized it to fashion a new federal common law rule, *see* App., *infra*, 9a-10a & n.4, the court erred again. *Dice* merely established that the validity of a release of a federal statutory right is ultimately a federal question as to which "[s]tate laws are not controlling." 342 U.S. at 361. But as this Court recently reiterated in *O'Melveny*, it is essentially irrelevant whether "federal" law nominally governs, because the controlling analysis is unchanged:

> [K]nowing whether 'federal law governs' in the *Kimbell Foods* sense — a sense which includes federal adoption of state-law rules — does not much advance the ball. The issue . . . is whether the California rule of decision is to be applied to the issue [at hand] or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition.

O'Melveny, 114 S.Ct. at 2053-54 (emphasis in original; citations omitted); *see also Boyle*, 487 U.S. at 507 n.3.

Furthermore, although state law was displaced in *Dice*, it was for reasons that have no application to the instant case. In Dice, the Court refused to apply an aberrant Ohio state law, not because there was a "uniquely federal interest," but because Congress' whole purpose in enacting the Federal Employers' Liability Act was to create a body of law that would have "uniform application throughout the country"; in fashioning that uniform federal rule, the Court adopted the majority rule applied in most States rather than the Ohio rule. 342 U.S. at 361-

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The court similarly erred in predicting that its ruling invalidating the global settlement agreement in this case "will not disrupt commercial relationships that are predicated on state law." App., *infra*, 11a. On the contrary, the Ninth Circuit's ruling in this case will make it very difficult to obtain conclusive settlements of liability in employment disputes with current or former employees: Because it is not uncommon for disgruntled employees to make frivolous allegations of company misconduct for use as a bargaining chip during settlement negotiations, the only way in which the company could be sure it would get the full release it is bargaining for is to transmit all such agreements to the Department of Justice for its review and approval — a "filing requirement" that would create a colossal financial and economic burden both for the private interests involved and for the government.

62.[11] Accordingly, *Dice* falls within the second class of cases in which, under *Texas Industries*, a federal court may create new federal rules of decision, namely "those in which Congress has given the courts the power to develop substantive law." *Texas Industries*, 451 U.S. at 640. As noted earlier, *see supra* at 19-20, this case does not fall within this latter class.

No other "uniquely federal interest" appears to be implicated by the private settlement agreement that was entered into by the parties in this case. Indeed, quite the opposite is true: This Court has held that "[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98. That principle has especial force in this case, because the contract at issue here was a global settlement agreement that resolved a pending *state* court action. *Cf. Matsushita Elec. Industrial Co. v. Epstein*, 116 S.Ct. 873, 881-82 (1996) (a state court has the authority to approve a global settlement in a state court action, even if the settlement resolves federal claims that are within the exclusive jurisdiction of the federal courts).[12]

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[11] That this is the correct reading of *Dice* is confirmed by the *Dice* Court's citation of a Jones Act case, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942), in which the Court employed identical reasoning in refusing to apply a Pennsylvania state law regulating the burden of proof with respect to disputes over the validity of a release. *See Dice*, 342 U.S. at 361. At the cited page of *Garrett*, the Court stated as follows:

> This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' The Act is based upon and incorporates by reference the Federal Employers' Liability Act, which also requires uniform interpretation. This uniformity extends to the type of proof necessary for judgment.

Garrett, 317 U.S. at 244 (citations omitted).

[12] Because *Matsushita* was not decided until after the Court of Appeals had already denied petitioner's petition for rehearing, it was not called to the attention of that court. We note, however, that it provides an alternative basis for concluding that the Ninth Circuit erred in this case. Because respondent's state and federal claims were all resolved in a pending state court proceeding, it follows that — unless the FCA has "impliedly repealed" the Full Faith and Credit Act, 28 U.S.C. § 1738 — the judgment of dismissal in the state court following the release of the federal claims must be given preclusive effect if a California court would accord preclusive effect to the judgment. 116 S.Ct. at

The Ninth Circuit's failure to identify which of the narrow class of "uniquely federal interests" was implicated in this case also caused it to make a second, closely related error. By omitting this crucial first step, and instead proceeding directly to the question whether state law conflicts with "federal policy," the Ninth Circuit ended up relying on the sort of "highly abstract" notions of policy that this Court has held are insufficient to serve as a basis for displacing otherwise applicable state law. *Wallis*, 384 U.S. at 70-71. By failing to require that the "federal policy" at issue be one that is rooted in, and reflects, one of the small class of "uniquely federal interests," the court was able to rely on highly vague notions of federal policy.

For example, the Ninth Circuit stated that applying California law to determine the validity of the settlement agreement would be contrary to the federal interest in "uniformity." App., *infra*, 11a. The court did not purport to tie this interest in uniformity to any "specific, concrete federal policy" of the FCA, *cf. O'Melveny*, 114 S. Ct. at 2055; rather, it simply declared that uniformity "is necessary to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of a state that is most likely to uphold the release." *Id.* This is, however, a classic bootstrapping argument: There is a need for "uniformity" to prevent such contractual choice of law only if one has first concluded that there is a policy *against* upholding releases. Moreover, this Court in *O'Melveny* dismissed such facile reliance on "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity," noting that if it so easily qualified as an identifiable federal interest, "we would be awash in 'federal common-law rules.' " 114 S.Ct. at 2055 (citation omitted).

Similarly, the Ninth Circuit erred by concluding that upholding the release would conflict with the FCA's general policy of " 'increas[ing] incentives, financial and otherwise, for private individuals to bring suits' " under the FCA. App., *infra*, 14a-15a (quoting S.Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267). In *O'Melveny*, this Court specifically rejected reliance on such generalized notions that state law "would 'disservice the federal program.' " 114 S.Ct. at 2055 (citation omitted); *see also Texas Industries*, 451 U.S. at 642.

878-84. Petitioner respectfully submits that it would not be inappropriate, as an alternative disposition of this case, for this Court to grant the petition, vacate the Ninth Circuit's judgment, and remand for reconsideration in light of *Matsushita*.

3. The Ninth Circuit's Analysis Conflicts With The Methodology Employed By The Third And Fifth Circuits

Apart from being inconsistent with controlling authority from this Court, the Ninth Circuit's analysis in this case conflicts with that employed in the Fifth Circuit and the Third Circuit. In several cases, these circuits have declined to displace state law in evaluating the validity of settlements precisely because there was not the required substantial federal interest. Thus, for example, in *In re Omni Video, Inc.*, 60 F.3d 230, 231-32 (5th Cir. 1995), the Fifth Circuit declined to displace state law in judging the validity of a settlement agreement, despite the fact that the agreement resolved rights under federal bankruptcy law, because the court "perceive[d] no strong federal interest in the issue of the validity of settlements entered into to resolve a bankruptcy suit." *See also Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598, 604-05 & n.5 (5th Cir. 1982) (because there was no "uniquely federal interes[t]" in the law governing permissible assignments of federal antitrust claims, state law governs the validity of such an assignment); *Eastern Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988) (validity of global settlement agreement, pursuant to which federal RICO action was dismissed, is governed by state law); *cf. Davidson v. FDIC*, 44 F.3d 246, 250-52 (5th Cir. 1995) (refusing to create federal common law because such rules "should displace state laws only in the case of a significant conflict with specific or unique federal interests").

Similarly, in *Tiernan v. Devoe*, 923 F.2d 1024 (3d Cir. 1991), the Third Circuit quoted *Boyle's* reference to "uniquely federal interest[s]" to support its view that the creation of federal common law is authorized only "where strong federal interests are involved." *Id.* at 1032 (citation and internal quotation marks omitted). Applying this standard, the court found "no substantial federal interest" implicated by the question of the scope of an attorney's authority to conclude a global settlement, and the validity of the settlement was therefore judged under state law. *Id.* at 1033; *cf. General Engineering Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 356-57 (3d Cir. 1986) (state law may be displaced only pursuant to express authority or "where strong federal interests are involved, as in cases concerning the rights and obligations of the United States"; accordingly, state law applied to the interpretation of a forum selection clause in a commercial contract).

The Third Circuit in *Tiernan* specifically held that applying a special federal rule of decision to the settlement of federal claims "would eviscerate any agreement in which the litigants sought settlement of all their claims." 783 F.2d at 1033. The Ninth Circuit's decision, by contrast, accomplishes precisely that sort of evisceration in the context of the global agreement at issue in this case.

More generally, this case provides an appropriate vehicle for providing much-needed guidance on the broader question "whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements" that cover federal claims — a "vexed one upon which a welter of cases have reached divergent if not flatly inconsistent results." *Gamewell Manufacturing, Inc. v. HVAC Supply, Inc.*, 715 F.2d 112, 113-14 (4th Cir. 1983). Courts have addressed this general question in cases involving claims arising under a variety of statutes and have reached conflicting results. *See, e.g., Blistein v. St. John's College*, 74 F.3d 1459, 1465-67 (4th Cir. 1996) (Age Discrimination in Employment Act); *Pierce v. Atchison, T. & S.F. Ry. Co.*, 65 F.3d 562, 570 (7th Cir. 1995) (ADEA) (collecting cases); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (CERCLA) (collecting cases); *Gess v. United States*, 909 F.Supp. 1426, 1446-47 (M.D. Ala. 1995) (Federal Tort Claims Act) (collecting cases); *see also Fleming v. United States Postal Service*, 27 F.3d 259, 260-61 (7th Cir. 1994) (noting that the law has been unsettled, even within the Seventh Circuit, on the question of what law governs settlements of federal claims), *cert. denied*, 115 S.Ct. 741 (1995); *Hansen v. Shearson/American Express, Inc.*, 890 F. Supp. 416, 427 (E.D. Pa. 1995) (noting that "there has been some division among the courts of appeals on the issue of when releases of federal claims are governed by a uniform, federal standard, and when the federal standard should be determined by reference to state law"). In particular, by making clear that a private agreement settling a federal claim simply does not implicate "uniquely federal interests," this Court could resolve all of these conflicts in this one case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 18, 1996

Respectfully submitted,

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No. 92-56392

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., *Plaintiff*, and MICHAEL E. GREEN, *Plaintiff-Appellant, v.* NORTHROP CORPORATION; NORM BUSSARD, *Defendants-Appellees.*

February 4, 1994, Argued, Submitted, Pasadena, California

July 12, 1995, Filed

Appeal from the United States District Court For the Central District of California. D.C. No. CV-91-0177-RG. Richard A. Gadbois, Jr., District Judge, Presiding.

COUNSEL: Michael G. Dawson, Law Offices of Herbert Hafif, Claremont, California, for the plaintiff-appellant.

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John R. Phillips, Hall & Phillips, Los Angeles, California, for amicus curiae Taxpayers Against Fraud.

Before: Dorothy W. Nelson, Stephen Reinhardt, and Melvin Brunetti, Circuit Judges. Opinion by Judge D.W. Nelson.

D.W. NELSON, Circuit Judge:

In this case, we address an important and difficult question involving the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* We must determine whether the release of a *qui tam* claim, when entered into without the United States' knowledge or consent, and prior to the filing of an action based on that claim, is enforceable. We hold that it is not.

BACKGROUND

In November 1988, Michael Green ("Appellant"), a former employee of Northrop, filed a complaint in California Superior Court against Northrop and several unnamed defendants alleging a number of state-law causes of action stemming from his termination by Northrop in October 1988. According to Green, while working as a

criminal investigator for Northrop's Advanced Systems Division, he uncovered evidence that Northrop had "double charged" the U.S. Air Force for equipment procured for the B-2 bomber program. Green maintained that he was discharged for having brought this information to the attention of certain Northrop officials and because he sought the advice of an attorney.

Northrop and Green eventually negotiated a settlement of this suit, and entered into a "Settlement Agreement and General Release" (the "Release") on April 16, 1990. The Release stated in general terms that the parties desired to settle "once and forever, all of the matters which have arisen between them including but not limited to disputes relating to or arising out of the Action and Green's employment with and separation from Northrop." Northrop agreed to pay Green $190,000 in return, *inter alia*, for his agreement to:

> release, acquit and forever discharge Northrop [and its] employees . . . from any and all claims . . . rights to payment . . . actions and causes of action of every nature, under any theory under the law, whether . . . statutory or other of any jurisdiction, whether known or unknown . . . which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters . . . including, but not limited to, those arising out of or relating to the Action and/or Green's employment with and separation from Northrop.

Subsequently, on January 11, 1991, Green filed a complaint under the *qui tam* provisions of the False Claims Act ("FCA" or "Act") against Northrop, a third party contractor known as Autek Systems Corporation, and several individual employees of both companies. The complaint alleged that the defendants conspired to submit false claims to the United States "for costs associated with the procurement of Automated Test Equipment (ATE) that Northrop was required to deliver under the B-2 contract." As in the original suit filed in the California courts, Green contended that the defendants engaged in, among other practices that violated the FCA, "double billing," and that "when [Green] began conducting an investigation with respect to the subjects of this lawsuit," he "informed Northrop's Security Department that he had found and documented corruption at the Executive Management Level in the B-2 Division," but that he was "ordered to close his investigation" and subsequently was terminated.

Following the filing of this action under seal, the United States, in accordance with the FCA, *see* 31 U.S.C.A. §§ 3730(b) (West Supp. 1994), undertook an investigation of the allegations made in the complaint. In February 1992, after conducting an inquiry that lasted several months, the United States declined to intervene in the suit. Defendants Northrop and Norm Bussard ("Appellees") subsequently moved for summary judgment, raising two arguments. First, Appellees contended that, as part of the release, Green had bargained away his right to bring a *qui tam* action, and therefore had "discharged all claims against Northrop and Bussard." Second, Appellees asserted that, as consequence of having bargained away his *qui tam* claim, including his statutory right to recovery, Green could not "demonstrate a personal stake in the outcome sufficient to satisfy [Article III] standing requirements." Accordingly, Appellees maintained that the action should be dismissed for lack of subject matter jurisdiction.

The district court agreed with Appellees on both counts, and entered summary judgment in their favor on July 15, 1992.[1] The district court concluded that the April 16, 1990, agreement unambiguously "released all claims that Green had or held against Northrop . . . including the statutory right to payment he seeks to recover under the False Claims Act in this *qui tam* action." Furthermore, the court determined that, because the government had elected not to intervene in the action, "there are no public policy considerations which would bar the enforcement of the General Release. On the contrary, public policy strongly favors the enforcement of 'ironclad and enforceable general releases.' " Finally, the court held that, because Green had "bargained away his right to payment under the False Claims Act, as well as any right to employment by Northrop, . . . he lost any standing he might have otherwise had to bring a *qui tam* action against Northrop." The court, therefore, dismissed the action for lack of subject matter jurisdiction.

Green timely appealed to this court, and he makes three arguments. First, Green maintains that, even if the district court determined correctly that he waived his rights to bring a *qui tam* action under the FCA by entering into the Release, the settlement of such a claim is void as a matter of public policy when entered into without

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[1] The other named defendants were not made part of the district court's order and are not before us.

the assent of the United States. Second, Green asserts that the district court erred in holding that the Release included either his right to bring a *qui tam* action or his statutory right to a portion of the recovery, attorneys' fees, or costs. Third, Green contends that the district court erred in determining that his standing to maintain a *qui tam* suit depended on his ability to recover the statutory award, and insists instead that injury-in-fact to the United States is all that a relator must demonstrate to establish Article III standing.

We assume for the purposes of analysis that, as Appellees insist, the Release encompassed both Green's right to bring a *qui tam* action as well as any recovery that might flow from that action. Nonetheless, we hold that this aspect of the Release is unenforceable because its enforcement would impair impermissibly a substantial public policy.[2] Consequently, we conclude that the district court's holding that

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[2] In the district court, although Green similarly maintained that enforcing the Release would violate public policy, he based this argument not on the federal common law test advanced in this court, but on California law. On this basis, Appellees maintain that we cannot reach the public policy issue because it has been raised for the first time on appeal.

The substance of the two tests, however, is quite similar; accordingly, we are not convinced that the district court did not pass upon the issue raised here. *Cf. In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (holding that an issue must be raised in a manner "sufficient for the trial court to rule upon it"). However, even if the precise issue we face has been raised for the first time on appeal, the waiver rule is not one of jurisdiction, but discretion. *See Singleton v. Wulff*, 428 U.S. 106, 121, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976); *Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980). We can exercise that discretion to consider a purely legal question when the record relevant to the matter is fully developed. *See, e.g., United States v. Bigman*, 906 F.2d 392, 395 (9th Cir. 1990); *see also Cristobal v. Siegel*, 26 F.3d 1488, 1493 (9th Cir. 1994) ("We have discretion to consider matters of law never considered prior to appeal."). Because the enforceability of the Release at issue in this case is such a question, and the parties will not be prejudiced by its resolution, we exercise our discretion here. *See Botefur v. City of Eagle Point*, 7 F.3d 152, 155 (9th Cir. 1993) (entertaining the argument that federal law controlled the validity of a release of a statutorily-conferred federal right when state law was relied upon in the district court).

Green lacks standing to pursue this action, and therefore, that the court lacked subject matter jurisdiction, cannot be sustained.[3]

DISCUSSION

I. Is the Enforceability of the Release Governed by Statutory Interpretation or Federal Common Law?

As an initial matter, the parties dispute sharply the proper focus of this court's inquiry. Appellant contends that the enforceability of the release of a qui tam claim must be measured by the federal common law test articulated by the Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 386, 94 L.Ed.2d 405, 107 S.Ct. 1187 (1987), and further elaborated upon by this court in *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir.), *cert. denied*, 501 U.S. 1252, 115 L.Ed.2d 1057, 111 S.Ct. 2892 (1991). Under the *Rumery/Davies* test, " 'a promise [will be found] unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.' " *Davies*, 930 F.2d at 1396 (quoting *Rumery*, 480 U.S. at 392 (relying upon Restatement (Second) of Contracts § 178(1) (1981))). By contrast, Appellees claim that "the public policy question that Green raises is a question of *statutory interpretation, not* contract law." Appellees insist, therefore, that the *Rumery/Davies* test is inapplicable, and that

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[3]We therefore have no occasion to consider whether the district court properly interpreted the Release. *See Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982) (reasoning that the intent of the parties "does not even become relevant until a court decides that the release could encompass" the claims at issue). Nor do we address Appellant's and the Amici's contention that a relator has Article III standing to pursue a *qui tam* action even after having bargained away, in its entirety, the right to recover under the Act. *Cf. United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748-49 (9th Cir. 1993) (holding that a *qui tam* relator establishes Article III standing as a partial assignee of the government's claim but emphasizing that "qui tam plaintiffs have the requisite personal stake in the outcome of the case to ensure that the issues are presented sharply and that more than 'the vindication of the value interests of concerned bystanders' is at stake" (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982))), *cert. denied*, 114 S.Ct. 1125 (1994).

the question of the release's enforceability "depends upon the intention of *Congress* as *manifested* in the *particular statute.*"

We agree with Appellees that we *first* must resolve an issue of statutory interpretation. The Court in *Rumery* did not hold that its test was applicable to every federal enactment. Rather, the Court drew upon "traditional common law principles" because that body of law informs "the principles governing § 1983 actions." *Rumery*, 480 U.S. at 392 (citing *Pulliam v. Allen*, 466 U.S. 522, 539-40, 80 L.Ed.2d 565, 104 S.Ct. 1970 (1984)). If Congress has expressed its intent as to the enforceability of a release such as that entered into in this case, however, we must give effect to that intent. *See Brooklyn Savs. Bank v. O'Neil*, 324 U.S. 697, 706-07, 89 L.Ed.1296, 65 S.Ct. 895 (1945). Even if federal common law otherwise would operate, it is displaced when Congress has decided the matter. *See, e.g., Central Bank v. First Interstate Bank of Denver, N.A.*, 128 L.Ed.2d 119, 114 S.Ct. 1439, 1448 (1994) (holding that the conclusion that Congress did *not* intend to impose aiding and abetting liability under section 10(b) of the Securities and Exchange Act "resolved the case" notwithstanding the acknowledged power of the federal courts, with respect to the section 10(b) actions, to fashion federal common law that "attempts to infer 'how . . . Congress would have addressed the issue,'" (quoting *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 124 L.Ed.2d 194, 113 S.Ct. 2085, 2090 (1993))).

Although we agree with Appellees that we first must attempt to ascertain Congress's intent with respect to the enforceability of the prefiling release of *qui tam* claims, we disagree with Appellees' additional contention that our analysis *necessarily* ends after construing the statute. There is a crucial difference between concluding that Congress intended a release to be enforceable and merely determining that, as a matter of statutory interpretation, there is an insufficient basis for inferring that Congress intended a release *not* to be enforceable. In the latter circumstance, we would be faced with a "gap" in the statutory scheme.

However, merely because a "gap" is encountered does not mean that a vacuum necessarily is created. State law, if not preempted, presumptively supplies the missing rule. *See O'Melveny & Myers v. FDIC*, 129 L.Ed.2d 67, 114 S.Ct. 2048, 2055 (1994). Moreover, although "once Congress addresses a subject . . . the justification for lawmaking by the federal courts is greatly diminished," *Northwest Airlines, Inc. v. Transportation Workers Union of*

America, AFL-CIO, 451 U.S. 77, 95 n.34, 67 L.Ed.2d 750, 101 S.Ct. 1571 (1981), the possibility nonetheless remains that federal common law might operate to fill the gap, *see, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 114 L.Ed.2d 152, 111 S.Ct. 1711 (1991).

II. Statutory Interpretation

Accordingly, we first must ascertain congressional intent with respect to the enforceability of a prefiling release of a *qui tam* claim entered into without the United States' knowledge or consent. This is a question of statutory interpretation that we address de novo. *See, e.g., United States ex rel. Killingsworth v. Northrop*, 25 F.3d 715, 721 (9th Cir. 1994).

A.

The FCA is silent as to the enforceability of a prefiling release of a *qui tam* claim. Congress did address, however, the ability of relators, defendants, and the United States to enter into settlements *following* the filing of a *qui tam* claim. Section 3730(b)(1) provides that a *qui tam* action "may be dismissed *only* if the court *and* the *Attorney General* give *written consent* to the dismissal and their reasons for consenting." 31 U.S.C.A. § 3730(b)(1) (West Supp. 1994) (emphasis added). We have ruled that, in the absence of a later decision by the government to intervene, *see United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1397 (9th Cir. 1992), this provision applies only during the initial sixty-day period, or however long that period is extended, during which the government may review the case and elect to proceed with the action, *see Killingsworth*, 25 F.3d at 722-23. In the absence of a decision by the government to intervene, the Act recognizes the relator's right to "settl[e] the claim," 31 U.S.C.A. § 3730(d)(2) (West Supp. 1994); although we have construed the Act to permit the government to object "with good cause" to the settlement's terms, *see Killingsworth*, 25 F.3d at 724-25. Similarly, if the government elects to intervene, the relator possesses the same right to a hearing to permit the court to determine "that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *See* 31 U.S.C.A. § 3730(c)(2)(B) (West Supp. 1994).

Appellees maintain that Congress's decision to address the enforceability of *post*filing settlements of *qui tam* claims ends our analysis, and that we must *presume* from Congress's silence that it intended *pre*filing releases of such claims to be enforceable. In making this

argument, Appellees rely on the canon of construction, invoked frequently in cases in which the issue is whether to imply a private right of action, that courts must "presume that a remedy was deliberately omitted from a statute . . . when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *E.g., Northwest Airlines*, 451 U.S. at 97; *see also Karahalios v. National Fed'n of Federal Employees*, 489 U.S. 527, 533, 103 L.Ed.2d 539, 109 S.Ct. 1282 (1989) ("It is an 'elemental canon' of statutory interpretation that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 62 L.Ed.2d 146, 100 S.Ct. 242 (1979). In such cases, 'in the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.' " (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15, 69 L.Ed.2d 435, 101 S.Ct. 2615 (1981))).

We find that the canon favored by Appellees simply is not relevant to the resolution of the question presented by this case. In the cases in which the canon traditionally has been applied, the question has been whether the statute at issue permits an implied private right of action. The canon serves to ensure that courts do not upset a "comprehensive legislative scheme" by creating additional "procedures for enforcement" that Congress did not intend. *Northwest Airlines*, 451 U.S. at 97.

By contrast, it is clear that, here, the FCA permits a *qui tam* suit to be brought by private parties and that such a remedy is a key part of the statute's "integrated system" for enforcement. *Id.* The question is only whether Congress intended that private parties be able to release this clearly available remedy without the consent of the government. In such a circumstance, the canon is of no help. The general presumption that Congress did not intend to create remedies by implication provides no guidance as to whether Congress intended to permit parties to release a particular remedy that it expressly created, and, if so, under what circumstances. In fact, it may be more consistent with the enforcement scheme set up by Congress to prevent parties from releasing the remedy without first obtaining the government's consent. Accordingly, we conclude that the presumption urged by Appellees is not warranted here.

B.

We find it inappropriate to presume Congress's intent from its failure to resolve the question expressly. Given the lack of any textual answer to this question or any relevant legislative history, we have no basis for inferring that Congress intended the release at issue to be enforceable or unenforceable. Congress's silence on the matter of prefiling releases could reflect just as reasonably its failure to contemplate the issue, its desire to leave resolution of the issue to the courts, its approval of such prefiling releases, or its determination that government consent is required. Therefore, we are faced with a "gap" in the statutory scheme. Accordingly, we must apply federal common law.

III. Federal Common Law

A.

1.

It is well established that federal common law properly is invoked to determine the validity of a release of a statutorily-conferred federal right. *See, e.g., Botefur v. City of Eagle Point*, 7 F.3d 152, 155 (9th Cir. 1993) (" 'The conditions affecting the validity of a release of significant federal rights are eminently a matter of federal law . . . .' " (quoting *Jones v. Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981))); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986) ("Federal law always governs the validity of releases of federal causes of action." (citing *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361, 96 L.Ed.398, 72 S.Ct. 312 (1952))).

Merely because federal common law governs the matter, however, does not mean that the rule must be uniform. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98, 111 S.Ct. 1711, 1717, 114 L.Ed.2d 152 (1991). Often, state law rules will provide "the governing federal law." *Mardan*, 804 F.2d at 1458.[4] When Congress does not direct

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[4]It is true that, in *O'Melveny & Myers v. FDIC*, 129 L.Ed.2d 67, 114 S.Ct. 2048 (1994), the Court stated that it would not "adopt a court-made rule to supplement a federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 2054. However, the Court did not purport to overrule its opinion in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 96 L.Ed.398, 72 S.Ct. 312 (1952), or establish a principle that did not exist at the time we decided *Mardan*. *See id.* (relying on *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97, 67 L.Ed.2d

whether the rule should be uniform, we determine if a uniform federal rule is appropriate based on the three-part test set out in *United States*

750, 101 S.Ct. 1571 (1981) and *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 319, 68 L.Ed.2d 114, 101 S.Ct. 1784 (1981)). This fact alone makes us reluctant to conclude that *O'Melveny* undercuts *Mardan*. Moreover, we do not think that the Supreme Court in *O'Melveny* intended to foreclose the possibility of displacing, with a federal common law rule, a state rule of decision that would conflict with specific policies of a comprehensive federal scheme. *O'Melveny*, 114 S.Ct. at 2055.

In *O'Melveny*, the Supreme Court carefully qualified the dicta quoted above with the statement that state law only *presumptively* controls to fill gaps in details statutory schemes. We think the question of the release of a federal cause of action is a situation in which this "presumption" can be rebutted. Here, the potential that state law might impair federal rights is substantial. Indeed, the *Dice* Court itself reasoned that federal rights easily could be defeated if federal law did not ultimately control the question of the validity of a release. *See Dice*, 342 U.S. at 361. Moreover, unlike other contexts in which formulating a federal common law rule would require courts to create enforcement mechanisms that Congress might not have intended, formulating a rule to assess the validity of a release merely involves protecting those rights that Congress *did* create. Accordingly, the concern that courts will undercut a balance struck by Congress, *see, e.g., O'Melveny*, 114 S.Ct. at 2055; *Northwest Airlines*, 451 U.S. at 97, or engage in a task more appropriately left for the legislature, *cf. Texas Industries*, 451 U.S. at 646 ("The range of factors to be weighed in deciding whether a right of contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue."), is implicated to a significantly lesser degree. Consequently, we believe that *Mardan* and *O'Melveny* can be reconciled, and that the possibility of fashioning a federal common law rule to displace a state law rule, when the state law rule would conflict with specific policies of a comprehensive federal scheme, remains open.

We also acknowledge that, in *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209 (9th Cir. 1991), we concluded broadly that "the FCA allows no room for the creation of additional federal common law," *id.* at 213. However, this last remark clearly was limited to situations involving the canon applicable to implied rights of action which, as discussed in the text, does not apply here. Indeed, we recognized the possibility that other questions relating to the Act might justify the formulation of federal common law rules that would displace state law. *Cf. id.* (concluding that, because fashioning a rule permitting contribution in favor of a FCA defendant was not "necessary to protect uniquely federal interests," it was inappropriate "to formulate federal common law *on that basis*" (emphasis added) (internal quotations omitted)). Because, under our decision in *Mardan*, federal common law ordinarily would displace state law, we do not believe that *Mortgages* precludes its application to determine the enforceability of a release of a *qui tam* claim entered into during the prefiling period.

v. Kimbell Foods, Inc., 440 U.S. 715, 59 L.Ed.2d 711, 99 S.Ct. 1448 (1979). "Under that test, a court must determine . . . (1) whether the issue requires 'a nationally uniform body of law,'; (2) 'whether application of state law would frustrate specific objectives of the federal program'; and (3) whether 'application of a federal rule would disrupt commercial relationships predicated on state law.' " *Mardan*, 804 F.2d at 1458 (quoting *Kimbell Foods*, 440 U.S. at 728-29).

2.

Because the FCA does not direct us to formulate uniform common law rules, we apply the *Kimbell Foods* test. We conclude that formulation of a uniform federal common law rule is justified.

Upholding the release at issue in this case would frustrate the policies underlying the *qui tam* provisions of the FCA. *See infra.* Although state law might emphasize the same general principles we apply below in assessing the validity of the release, *see Rumery*, 480 U.S. at 392 n.2, there is a distinct possibility that state law would overemphasize, as we conclude that the district court did here, the interest favoring "ironclad and enforceable general releases." *E.g.*, *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992). Therefore, although some states might reach permissible results, a substantial risk remains that "a 'significant conflict' " would arise "between an identifiable 'federal policy or interest and the [operation] of state law,' " *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507, 101 L.Ed.2d 442, 108 S.Ct. 2510 (1988), which is a "precondition for recognition of a federal rule of decision," *O'Melveny*, 114 S.Ct. at 2055.

Uniformity, moreover, is necessary to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of a state that is most likely to uphold the release. *Cf. Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992) (holding that a settlement agreement purporting to waive a federal securities claim is governed by federal law even when it contains a choice of law claim because " 'federal statutory rights could be easily defeated if state law could be used to control the incentives of those rights and the defenses to them' " (quoting *Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977))). Finally, applying a uniform federal rule will not disrupt commercial relationships that are predicated on state law.

B.

Accordingly, we find it appropriate to fashion a uniform federal common law rule to determine the validity of releases such as the one at issue in this case. As with section 1983 actions, which are governed by "traditional common law principles," *Town of Newton v. Rumery*, 480 U.S. 386, 392, 94 L.Ed.2d 405, 107 S. Ct. 1187 (1987), we apply the *Rumery/Davies* test. In *Rumery*, the Supreme Court held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* In *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir.), *cert. denied*, 501 U.S. 1252, 115 L.Ed.2d 1057, 111 S.Ct. 2892 (1991), this court elaborated on the *Rumery* test.[5] We concluded that the key feature that led the Supreme Court to find enforceable the particular agreement considered in *Rumery* — an agreement by which a prosecutor agreed to waive criminal charges against the plaintiff in exchange for the plaintiff's agreement to waive all civil rights claims against the prosecutor — was that the agreement involved "merely private rights" and did not involve a "broad public interest that outweighed *Rumery*'s voluntary decision to enter into an otherwise valid agreement." *Id.* at 1396-97.

Accordingly, in *Davies*, we first inquired whether the right waived "by its nature [was] one that implicated the public interest," *id.* at 1398, and the extent to which the public interest would be harmed by enforcement of waiver, *see id.* at 1397-98. Next, we focused on "the factors that favor enforcement." *Id.* at 1398. We first acknowledged the "admittedly important" policy that "favors enforcement of private agreements and the encouragement of settling litigation." *Id.* We noted, however, that this interest would be present "in every dispute over the enforceability of an agreement terminating litigation." *Id.* Consequently, we reasoned that:

> where a *substantial* public interest favoring nonenforcement is present, the interest in settlement is insufficient. Otherwise there would be no point to the *Rumery* balancing test: since the interest in settlement is present in every case, every settlement agreement would be enforced. Clearly, then, when there is a

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[5] Although *Davies* involved the waiver of a constitutional right, and not a statutorily-conferred cause of action as did *Rumery*, we assumed, without deciding, that *Rumery* supplied the appropriate standard. *See Davies*, 930 F.2d at 1397.

> substantial public interest that would be harmed by enforcement . . . the party seeking enforcement must, at the least, advance some important interest in addition to the interest in settlement.

Id. (emphasis added).

Davies thus requires us (1) to determine whether the agreement waives a right that impacts upon the public interest; (2) determine whether a *substantial* public interest would be impaired by enforcement of the agreement; and (3) to ascertain the reasons apart from the general interest in settling disputes that support enforcing the agreement.[6] If no substantial public interest would be impaired by the agreement, we must consider, as the Court did in *Rumery*, all the factors that bear on whether "the public interest in enforcement of the agreement outweigh the policies furthered by non-enforcement." *Davies*, 930 F.2d at 1396. If we conclude that a substantial public interest would be impaired, we need not engage in balancing absent the articulation of a public interest other than the "interest in the settlement of litigation"; for that interest "cannot by itself outweigh a substantial public interest on the other side of the scales." *Davies*, 930 F.2d at 1399.[7]

C.

We first conclude that enforcing the release at issue in this case would impair a substantial public interest. Specifically, we find that enforcing the Release would threaten to nullify the incentives Con-

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[6] As the *Davies* court noted, when an agreement that involves the government is at issue, the burden of proof, at least in the context of the "waiver of a civil right," is on the government. *Id.* at 1397 n.8 (citing *Lynch v. City of Alhambra*, 880 F.2d 1122, 1125-26 (9th Cir. 1989)). We need not decide which party has the burden of proof in the context of this dispute because, as in *Davies*, "we would hold the challenged provision of the settlement agreement unenforceable regardless of which party bore the burden of proof." *Id.*

[7] The *Davies* court also stated that it would not enforce the agreement before it because of the lack of a "close nexus" between the "specific interest the government seeks to advance in the dispute underlying the litigation and the specific right waived." *Id.* at 1399. The court specifically did not address "the proper role of nexus in agreements," such as the one at issue in this case, that "involve only private parties." *Id.* at 1399 n.11. Because, as discussed below, we find the release in this case invalid independent of any issue of nexus, we do not reach this question.

gress intended to create in amending the provisions of the False Claims Act in 1986.

1.

The history and structure of the FCA and its *qui tam* provisions is well described elsewhere. *See generally United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 304 U.S. App. D.C. 347, 14 F.3d 645, 649-55 (D.C. Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 745-47 (9th Cir. 1993), *cert. denied*, 127 L.Ed.2d 433, 114 S.Ct. 1125 (1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1152-1154 (3d Cir. 1991); John T. Boese, *Civil False Claims and Qui Tam Actions* (1993). It is commonly recognized that the central purpose of the *qui tam* provisions of the FCA is to "set up incentives to supplement government enforcement" of the Act, *Quinn*, 14 F.3d at 649, by "encouraging insiders privy to a fraud on the government to blow the whistle on the crime," *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

The vital importance of this incentive effect is demonstrated by the reasons set forth by Congress in 1986 in undertaking the first extensive revision of the Act since its enactment in 1863. Congress expressed its judgment that "sophisticated and widespread fraud" that threatens significantly both the federal treasury and our nation's national security only could successfully be combatted by "a coordinated effort of both the Government and the citizenry." S. Rep. No. 345, 99th Cong., 2d Sess. 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68 [hereinafter Senate Report]. Emphasizing both difficulties in detecting fraud that stem largely from the unwillingness of insiders with relevant knowledge of fraud to come forward, *see id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269, and "the lack of resources on the part of Federal enforcement agencies" that often leaves unaddressed "allegations that perhaps could develop into very significant cases," *id.* at 7 *reprinted in* 1986 U.S.C.C.A.N. at 5272, Congress sought to "increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government," *id.* at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Congress's overall intent, therefore, was "to encourage more private enforcement suits." *Id.* at 23, *quoted in* 1986 U.S.C.C.A.N. at 5288-89; *see also Killingsworth*, 25 F.3d at 721 ("The amended Act 'increased incentives, financial and otherwise, for private individuals to bring suits on behalf of the

Government.'" (quoting Senate Report, *supra*, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 5267)).

The importance of the Act's incentive effect is evidenced clearly in the revised Act's structure. A relator who properly brings a claim will generally receive a share of the recovery as well as eligibility for attorneys' fees and costs. *See* 31 U.S.C.A. § 3730(d) (West Supp. 1994). This is true even if the government decides to intervene and conducts the action itself, *see id.* § 3730(d)(1), or elects to pursue its claim in an administrative proceeding, *see id.* § 3730(c)(5). The right to recovery clearly exists primarily to give relators incentives to bring claims.[8] Moreover, the extent of the recovery is tied to the importance of the relator's participation in the action and the relevance of the information brought forward.[9] This demonstrates not only the importance of the incentive effect, but that Congress wished to create the greatest incentives for those relators best able to pursue claims that the government could not, and bring forward information that the government could not obtain.

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[8]Providing the relator a right to recover, a role in the action when the government intervenes, see 31 U.S.C.A. § 3730(c)(1) (giving the relator a right "to continue as a party" notwithstanding the government's decision to proceed with the action), and a right to object to a dismissal or settlement by the government, *see id.* § 3730(c)(2)(A), (B), also serve the additional purpose of giving a relator the incentive to "act[ ] as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reasons." Senate Report, *supra*, at 25-26, *reprinted in* 1986 U.S.C.C.A.N. at 5290-91.

[9]If the government chooses to conduct the action, the relator will receive "at least 15 percent but no more than 25 percent of the action or settlement of the claim, depending upon the *extent to which the person substantially contributed to the prosecution of the action.*" *Id.* § 3730(d)(1) (emphasis added). If the action is "one which the court finds to be based primarily on [previously publicly] disclosed . . . information . . . the court may award such sums as it consider appropriate, but in no case more than 10 percent of the proceeds, *taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.*" *Id.* (emphasis added). A relator conducting the action herself receives no "less than 25 percent and not more than 30 percent of the proceeds of the action or settlement." *Id.* § 3730(d)(2). Finally, the award may be reduced or eliminated altogether if the relator was involved in the fraud. *See id.* § 3730(d)(3).

The Act's jurisdictional provisions also demonstrate Congress's concern with maintaining adequate incentives for those who materially would advance the goals of revealing fraud and supplementing government enforcement efforts. Under the Act, if an action is "based upon the public disclosure of allegations or transactions in" certain specified proceedings, reports, or mediums, a *qui tam* action cannot be brought unless the relator "is an original source of the information" on which the allegations are based. 31 U.S.C.A. § 3730(e)(4)(A) (West Supp. 1994). We held in *Wang* that "section 3730(e)(4)(A) requires a *qui tam* plaintiff to have played some part in his allegation's original public disclosure." *Wang*, 975 F.2d at 1418. Reviewing the history of the Act's jurisdictional provisions and the concerns that led Congress to amend the Act in 1986, we concluded that "Congress wanted in 1986 what it apparently thought it had in 1943: a law requiring that the relator be the original source of the *government's* information." *Id.* at 1419 (emphasis in original). We therefore held that engrafting a requirement that "a *qui tam* plaintiff . . . have played some part in his allegation's original public disclosure," *id.* at 1418, was in accord with Congress's purpose "of encouraging private individuals who are aware of fraud being perpetuated against the Government to bring such information forward," *id.* at 1419 (internal quotations omitted)), because it " 'discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time,' " *id.* (quoting *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)).

We recognize that creating incentives for those with knowledge of fraud to come forward was not Congress's sole objective. In carefully crafting provisions that specify the relator's recovery and in amending the jurisdictional provisions, it is clear that Congress attempted "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *Quinn*, 14 F.3d at 651. Moreover, once a claim is filed, it is clear that an important concern is ensuring that the United States' rights are not prejudiced by the relator's conducting of the action. That is why, in *Killingsworth*, we read into the Act the right of the government to object to a settlement between a relator and defendant when the settlement might be structured artificially to defeat the United States' right to recovery. *See Killingsworth*, 25 F.3d at 723-25. That is also why the government retains the right to inter-

vene for good cause and to reduce substantially the relator's role. *See* 31 U.S.C.A. § 3730(c).

The balance struck by Congress in the Act, however, clearly operates against the background assumption that relators' incentives to bring claims would not *otherwise* be frustrated. As discussed above, Congress clearly was of the judgment that, without creating incentives for relators to bring *qui tam* actions, the government in many cases might not even learn of the fraud. Moreover, the concerns with deterring frivolous suits and protecting the rights of the United States in a claim are not implicated when the relator chooses not to file. Accordingly, when we consider, as we do here, a release of a claim in the *pre*filing period, it is clear that our focus must be on what impact the release will have on the incentive effect Congress intended to create and the importance of that incentive effect in achieving the FCA's goals of detecting and deterring fraud on the government.

2.

We think it plain that enforcing a prefiling release of a *qui tam* claim would dilute significantly the incentives that Congress attempted to augment in amending the Act. If the release will be enforced, a party will have no right or reason to file a qui tam claim. We further believe that impairing these incentives will impair significantly the operation of the FCA. Although not all *qui tam* claims will be settled prior to the filing of an action, it appears that, for the reasons discussed below, relators have significant incentives to enter into such agreements. And although, as Appellees maintain, enforcing the Release at issue in this case would not *prohibit* a relator from coming forward with information concerning Appellees' alleged misconduct, our analysis of the structure and purposes of the Act demonstrates that this consideration is not dispositive. If the *qui tam* provisions *never* had been enacted, presumably whistleblowers still *could* come forward. The Act reflects Congress's judgment that *incentives to file suit* were necessary for the government to learn of the fraud or to spur government authorities into action; permitting a prefiling release when the government has neither been informed of, nor consented to, the release would undermine this incentive, and therefore, frustrate one of the central objectives of the Act.

We recognize that the FCA aims at achieving deterrence as well as restitution. *See Mortgages, Inc. v. United States Dist. Court*, 934 F.2d

209, 213 (9th Cir. 1991) (citing *United States v. McLeod*, 721 F.2d 282, 285 (9th Cir. 1983)). As expressed by a court discussing the original version of the Act, *qui tam* actions are based on the theory "that one of the least expensive and most effective means of *preventing* frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain." *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885) (quoted, *inter alia*, in *Quinn*, 14 F.3d at 649 (emphasis added)). It can be argued that monies paid in settlement to a relator outside of the framework of an action brought under the Act should have an equivalent deterrent effect to monies paid in settlement subsequent to the filing of the suit. We believe, however, that the Act's deterrent objectives would be diluted substantially by the enforcement of prefiling releases.

To see this, one need only assume that, but for the filing of a *qui tam* claim, the government would be significantly less likely to learn of the allegations of fraud. Because Congress itself has made this very assumption, *see* Senate Report, *supra*, at 4-7, *reprinted in* U.S.C.C.A.N. at 5269-72, we find it a reasonable starting point. When the *qui tam* relator files suit, the relator stands to receive only a percentage of the eventual proceeds from the action; at most, this will amount to 30 percent of the recovery. *See* 31 U.S.C.A. § 3730(d) (West Supp. 1994). Accordingly, in settlement negotiations, both the government and the relator will have incentives to maximize the expected gross recovery.

The situation changes when a potential relator and defendant enter into a *pre*filing release of a *qui tam* claim when, as we assume here, that action makes its less likely that the government will learn of the fraud. Under these circumstances, the relator is likely to keep the *entire amount* of the settlement proceeds.[10] Because the relator is

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[10] This follows from our assumption that the government is unlikely to learn of the allegations of fraud or the terms of the settlement. We need not decide, therefore, whether the United States could bring an action for unjust enrichment against a person who settles a claim for a portion of the settlement value, *cf. Mortgages*, 934 F.2d at 213 (refusing to imply a private right of action to contribution and indemnification into the FCA), or if § 3730(d) of the FCA, which specifies the portion of the proceeds of an "action or settlement of the claim" to which the relator is entitled, *see* 31 U.S.C. § 3730(d)(1), (2), is limited to claims already filed, *cf. id.*

likely to retain 100 percent as opposed to a maximum 30 percent of the recovery, a rational relator would be willing to accept a substantially smaller amount to settle the claim immediately than to preserve the right to eventually file a *qui tam* action in which the government would retain the lion's share of the proceeds.

To be sure, the concerns identified above are not as pressing on the facts of this case as they would be in many other contexts. The government now has learned of the allegations of fraud made by Green. Indeed, as recounted above, the government undertook an investigation that lasted several months. On the basis of these observations, Appellees maintain that, even if the purposes of the FCA might be undermined by enforcing a general release in other contexts, enforcing the Release at issue here would not have such an effect.

It is critical to observe, however, that the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint.* If the prevailing legal rule were that prefiling releases entered into without the government's consent or knowledge were enforceable, then it stands to reason that Green never would have filed his *qui tam* complaint in the first place. And, as discussed above, both the structure of the Act and the legislative history reveal that it is the *filing* of more private suits that Congress sought to encourage, both to increase enforcement and deterrence as well as to spur the government to undertake its own investigations.[11]

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§ 3730(d)(1), (2), (3), (4) (consistently referring to the "action" that was "brought" and the person "bringing" the action).

Of course, if the government is entitled to a portion of the settlement proceeds, this only strengthens our central point. A relator will be *less* likely to come forward with information concerning fraud if doing so will tip off the government as to the existence of settlement proceeds to which it is entitled to a portion.

[11] Although the allegations Green made in his suit in the California courts may have "publicly disclosed" the allegations within the meaning of the Act, this does not necessarily require the conclusion that state-law suits by relators necessarily will inform the government of the allegations of fraud. As acknowledged by Congress, the government may lack adequate resources to engage in the necessary monitoring. Moreover, the Act's jurisdictional provisions, to which the "public disclosure" of the allegations is relevant, serves the quite different purpose of precluding suits by opportunists who lack firsthand knowledge of the fraud. *See Wang*, 975 F.2d at 1419 ("'A whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave

In light of the *ex ante* effects of enforcing the parties' agreement, we reject Appellees' contention that the policies of the FCA would not seriously be impaired by enforcing the Release.

We also find unpersuasive Appellees' argument that the objectives of the *qui tam* provisions would not be impaired by enforcing the Release because other Northrop employees can "prosecute claims under the act in accordance with its terms." First, we note that, on the facts of this case, it probably is not true that other employees could prosecute the claim. By filing his wrongful termination suit in state court, Green "publicly disclosed" the allegation of fraud within the meaning of section 3730(e)(4)(A) of the Act. *See, e.g., United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir.) (noting that "every court of appeal to have addressed the question" has held that "any information disclosed though civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing of the purposes of section 3730(e)(4)(a)"), *cert. denied*, 130 L.Ed.2d 278, 115 S. Ct. 316 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158-59 (2d Cir.), *cert. denied*, 125 L.Ed.2d 663, 113 S.Ct. 2962 (1993). A subsequent would-be relator whose claim is "based upon" the same allegations could maintain an action, therefore, only if he or she qualified as an "original source of the information" upon which the allegations are based. 31 U.S.C.A. § 3730(e)(4)(A). However, as noted above, under this circuit's decision in *Wang*, "to bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit." *Wang*, 975 F.2d at 1418. Consequently, there may be no other qui tam relator who could bring an action based upon the allegations made by Green.

Of course, as discussed above, we must look more broadly than to the facts of this case. As a general matter, however, we think that hypothesizing the existence of other employees who possess relevant information and are willing to come forward is far too fragile a basis for enforcing the Release. There is, of course, no guarantee that such persons exist. Moreover, under Northrop's logic, it presumably would

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enough to speak out in the face of a 'conspiracy of silence,' and not their mimics" (quoting Senate Report, *supra*, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 5271)). Finally, it is reasonable to assume that a substantial number of claims are settled before the filing of any suit.

be permissible for Northrop to enter into similar release agreements with other employees as long as Northrop stops short of demanding a release from *all* of its employees as a matter of course. If we were to routinely uphold prefiling releases, however, it is unclear how the government or the courts could ensure that potential relators remain.

Appellees additionally maintain that, even if the release in this case removes the very incentives that the *qui tam* provisions of the FCA seek to foster, this result will not impair a substantial *public* interest. They argue that the public interest is not impaired because a Release entered into in the period prior to the filing of a claim, unlike a postfiling settlement, cannot foreclose the government from bringing suit. Even assuming that a postfiling settlement precludes a subsequent action by the government, we think this argument misses the point for exactly the same reason that Appellees' missed the point with their argument that a settlement would not prevent relators from coming forward with the relevant information. As we emphasized above, the very purpose of the Act's *qui tam* provisions is to create incentives for relators to supplement government enforcement. Although, once a suit is filed, the concern with ensuring that the government receives an appropriate share of the recovery is an important consideration, *see Killingsworth*, 25 F.3d at 723-25, such was not Congress's sole concern. The Act, as discussed above, is premised on the view that combatting government fraud requires incentives for those with relevant information of fraud to come forward. Preservation of the incentive effect in the prefiling period, therefore, clearly is a concern infused with the public interest. *See Kelly*, 9 F.3d at 760 ("The public's interest in successfully enforcing the FCA and the relator's private interest are intertwined . . . .").

Appellees next maintain that, even if the "public interest" is impacted by diluting incentives, this effect is not "substantial." They rely on *Rumery*, in which a plurality of the Court, noting that the plaintiff there "had no public duty to institute a § 1983 action merely to further the public's interest in revealing police misconduct," characterized the public interest at issue as "diffuse[ ]" and refused to "elevate" it "above Rumery's considered decision that he would benefit personally from the [release]." *Rumery*, 480 U.S. at 395.

Section 1983 and the *qui tam* provisions of the FCA, however, serve very different goals. Section 1983 exists both to vindicate the public interest in deterring deprivations of constitutional rights and to compensate those actually injured. *See, e.g., Memphis Community*

Sch. Dist. v. Stachura, 477 U.S. 299, 307-09, 91 L.Ed.2d 249, 106 S.Ct. 2537 (1986); *cf. Farrar v. Hobby*, 121 L.Ed.2d 494, 113 S.Ct. 566, 573 (1992) ("The basic purpose of a § 1983 damage award should be to compensate persons for injuries caused by the deprivation of constitutional rights." (internal quotations omitted)). As the *Rumery* Court itself observed, although "§ 1983 actions [brought] to vindicate civil rights may further significant public interest," "Congress has confined the decision to bring such actions to the *injured individual, not the public at large.*" *Rumery*, 480 U.S. at 394-95 (emphasis added).

By contrast, the private right of recovery created by the *qui tam* provisions of the FCA exists not to compensate the *qui tam* relator, but the *United States.*[12] The relator's right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury. *See Kelly*, 9 F.3d at 760. Therefore, unlike a section 1983 claim, *qui tam* actions exist *only* to vindicate the public interest. The situation we face here thus differs substantially from that in *Rumery*, where the Court faced a perceived conflict between the Act's compensatory and deterrent objectives, and the Court had to assess the weight that should be accorded to each. Here, the compensatory concern is absent; it simply is irrelevant, then, that the relator in this case, like the plaintiff in *Rumery*, made a "considered decision that he would benefit personally from the agreement." *Rumery*, 480 U.S. at 395. Moreover, as discussed above, Congress itself has stated that the public interests that the qui tam provisions serve are substantial. *Cf. Siller*, 21 F.3d at 1346 n.6 ("The public interest [at stake in the FCA's enforcement] here entrusted primarily to the government's protection is a particularly substantial one."). Therefore, although relators, like section 1983 plaintiffs, have no *duty* to institute actions, we conclude that prefiling settlements of *qui tam* claims have a far more significant impact upon the public interest than do settlements of claims such as the one at issue in *Rumery*.[13]

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[12] We do not consider in this case whether a different analysis would be required for a claim brought under the Act's anti-retaliation provisions, found in 31 U.S.C.A. § 3730(h).

[13] Appellees also argue that failure to enforce the release would, in effect, "*force* individuals to become *qui tam* plaintiffs," Appellees' Brief at 25 (emphasis in original), an "Orwellian" result that Congress did not intend. We disagree. Refusing to enforce a Release such as that entered into in this

D.

Having concluded that upholding the release in this case would impair a substantial public policy, we turn to an assessment of the interests that favor enforcement.

Appellees maintain that the most important public policy at issue in this case is "whether a defense contractor will ever be able to settle, fully and finally, the disputes that may arise with its employees." They rely upon *Coleson v. Inspector General of the Dep't of Defense*, 721 F. Supp. 763 (E.D. Va. 1989), in which the court upheld a settlement agreement that might have included qui tam claims[14] on the basis that "'the law strongly favors settlement of disputes, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into.'" Id. at 769 (quoting *Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988)).

At oral argument, Appellees explained that refusing to enforce a general release that encompasses *qui tam* claims will significantly burden not only federal defense contractors, but also hospitals, universities, and other entities that receive federal funds and face a significant volume of employment-related litigation. Appellees reason that these entities, if they lack the ability to "buy complete peace" with employees, will be less likely to settle employment-related claims. Such a result, the argument runs, will impose significant costs on these entities, their employees, and the judicial system that, in sum, outweigh the public interest impaired by eviscerating the incentives to bring *qui tam* claims.

In making this argument, Appellees rely primarily on the "general interest in the settlement of litigation" that we found insufficient in

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case does not *compel*, although it certainly will *encourage*, a relator to file suit. Because Congress intended "to encourage more private enforcement suits," Senate Report, *supra*, at 23, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89, we cannot conclude that this incentive effect weighs *in favor* of upholding the Release.

[14]Despite the court's reference to "federal statutory provisions providing rewards to 'whistleblowers,'" *Coleson*, 721 F. Supp. at 767, the plaintiff in *Coleson* did not appear to bring a *qui tam* action, but instead an action under the FCA's anti-retaliation provision, 31 U.S.C.A. § 3730(h). *See Coleson*, 721 F. Supp. at 765. Even assuming that *Coleson* involved a *qui tam* claim, however, we reject its reasoning as applied to *qui tam* claims for the reasons discussed below.

Davies to overcome the impairment of a substantial public interest. *Davies*, 930 F.2d at 1398-99. Of course, defendants, employees, and other employers may suffer *some* additional costs from the inability of employers to obtain fully-enforceable general releases such as the one at issue in this case. However, we simply cannot conclude that the costs identified by the Appellees outweigh the costs that would result from eviscerating the incentives created by the FCA.

In fact, the imposition of these additional costs may actually further the purposes of the FCA. Presumably, the defendants who will be deterred most from settling non-FCA claims because of the possibility of a *qui tam* suit are those who face the greatest exposure under the Act. *Cf. Evans*, 475 U.S. at 735 (concluding that the impact of prohibiting negotiated fee waivers would be substantial in part because the fee award often "overshadows the potential cost of relief on the merits"). These defendants, of course, are the very defendants who are most likely to have committed fraud in the first place, and a central objective of the *qui tam* provisions is precisely to augment the incentives for employees of such entities to come forward. *See* Senate Report, *supra*, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269 ("Detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity."). Therefore, if refusal to enforce the Release in this case increases defendants' costs, this actually might have the salutary effect of *further* deterring defendants from engaging in fraud, which, in the long-run, might render the costs Appellees foresee insubstantial. We therefore cannot conclude that the costs Appellees envision are of a sufficient magnitude to offset the dilution in incentives to bring *qui tam* claims that would result from enforcing the Release.

For the foregoing reasons, we conclude that application of the *Rumery/Davies* test compels the conclusion that prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim.

CONCLUSION

For the above reasons, we hold that the Release entered into in this case cannot be enforced to bar Appellant's *qui tam* claim. The district court's conclusions that Appellant lacked standing to pursue the action, and therefore, that the court lacked subject matter jurisdiction, accordingly are **reversed**. The case is **remanded** to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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Attorneys for Defendants
Northrop Corporation, Inc. and
Norm Bussard

CASE NO. 91-0177 RG (GHKx)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, ex rel.,
Michael E. Green,
Plaintiffs,

v.

NORTHROP CORPORATION, INC., a California corporation;
AUTEK CORPORATION; a California corporation;
LEE LANE, aka LEE LANE MCCUTCHEON,
an individual; SAM MCCUTCHEON, an individual;
and NORM BUSSARD; an individual,
Defendants.

ORDER PURSUANT TO RULE 54(b), FEDERAL RULES OF CIVIL PROCEDURE, CERTIFYING FINAL JUDGMENT IN FAVOR OF DEFENDANTS NORTHROP CORPORATION, INC. AND NORM BUSSARD

DATE: September 21, 1992
TIME: 10:00 a.m.
PLACE: Courtroom of the Honorable Richard G. Gadbois

Having considered the moving and opposing papers, the argument of counsel, the pleadings and other papers on file in this case, and such other matters of which it may take judicial notice, the Court finds as follows:

FINDINGS OF THE COURT

1. The summary judgment ordered by this Court on June 29, 1992, in favor of defendants Northrop Corporation, Inc. and Norm Bussard (collectively referred to as the "Northrop Defendants"), completely disposed of all claims against the Northrop Defendants in this litigation.

2. There is no just reason to delay entering final judgment in favor of the Northrop Defendants based on the June 29 summary judgment.

a. Because the summary judgment in favor of the Northrop Defendants was based upon a settlement agreement, rather than the facts alleged in the Complaint, the certification of final judgment poses no threat of issues being relitigated during piecemeal review.

b. There is also no possibility that the issues involved in the summary judgment will be mooted by further developments in this litigation.

c. Certifying the judgment as to the Northrop Defendants as final at this time may also serve to conserve judicial resources and avoid the need for further developments in this Court.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The summary judgment in favor of defendants Northrop Corporation, Inc. and Norm Bussard which this Court ordered on June 29, 1992, is hereby certified as final, pursuant to Rule 54(b), Federal Rules of Civil Procedure.

Dated: 9-28-92

/s/ RICHARD A. GADBOIS, JR.
Honorable Richard G. Gadbois
United States District Judge

PREPARED BY:

Dated: August 31, 1992

MUNGER, TOLLES & OLSON
BRAD D. BRIAN
D. BARCLAY EDMUNDSON
GARY D. ROBERTS

By /s/ D. BARCLAY EDMUNDSON
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Northrop Corporation, Inc. and
Norm Bussard

CASE NO. 91-0177 RG

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, EX REL.,
MICHAEL E. GREEN,
Plaintiffs,

v.

NORTHROP CORPORATION, INC., a California corporation;
AUTEK CORPORATION; a California corporation;
LEE LANE, aka LEE LANE MCCUTCHEON,
an individual; SAM MCCUTCHEON, an individual;
and NORM BUSSARD; an individual,
Defendants.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

DATE: June 29, 1992
TIME: 10:00 a.m.
PLACE: Courtroom of the Honorable Richard G. Gadbois

On June 29, 1992, Defendants' Motion for Summary Judgment, or Alternatively, to Dismiss, On Grounds that the Claims Asserted in this Case Have Been Released, came on for a hearing before the Honorable Richard G. Gadbois, Jr., United States District Judge. *Qui tam* Plaintiff Michael Green was represented by Linda R. MacLean, Esq., of the Law Offices of Herbert Hafif. Defendants Northrop

Corporation, Inc., and Norm Bussard were represented by D. Barclay Edmundson, Esq., and Gary D. Roberts, Esq., of Munger, Tolles & Olson. Defendants Autek Systems Corporation, L. Lee Lane and Samuel L. McCutcheon were represented by Thomas J. Nolan, Esq., of Miller & Nolan, Inc.

The Court, after carefully reviewing the pleadings and papers filed or lodged by the parties, and after hearing the argument of counsel, ordered that the Motion for Summary Judgment be granted as to Defendants Northrop Corporation, Inc., Norm Bussard and L. Lee Lane, as follows:

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

A. Uncontroverted Facts

1. In approximately 1980, the Advanced Systems Division, a division of defendant Northrop Corporation ("Northrop") also known as the "B-2 Division," entered into a contract with the United States for the development and production of the B-2 "Stealth Bomber." [Complaint for Violation of the False Claims Act, ¶ 15 (hereinafter "False Claims Act Complaint, ¶ ____)."]

2. As part of this contract, Northrop was required to design and develop Automated Test Equipment to test the avionics systems of the B-2 Stealth Bomber. [False Claims Act Complaint, ¶ 16.]

3. In September of 1986, *qui tam* plaintiff Michael E. Green ("Green") commenced employment as an investigator at Northrop's B-2 Division. [False Claims Act Complaint, ¶ 6.]

4. In his capacity as an investigator, it was Green's responsibility to investigate allegations of employee fraud and security violations, and to investigate into areas where the government may have been defrauded or damaged as a result of procurement violations. [False Claims Act Complaint, ¶ 7.]

5. During his employment at Northrop, Green conducted an internal investigation into whether Northrop had submitted false claims to the United States for costs associated with the procurement of Automated Test Equipment. [False Claims Act Complaint, ¶¶ 8, 16.)

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6. Green's employment with Northrop was terminated in October 1988. [False Claims Act Complaint, ¶ 8.]

7. On November 3, 1988, Green filed an action for tortious discharge and breach of implied covenant of good faith against Northrop in Los Angeles County Superior Court captioned *Green v. Northrop Corporation*, No. SEC 70908 (hereinafter "the tortious discharge action"). [Complaint for Tortious Discharge Based on Public Policy; Breach of Implied Covenant of Good Faith and Fair Dealing; Jury Trial Demand, attached as Ex. A to Roberts Declaration (hereinafter "Tortious Discharge Complaint, ¶ ____)."]

8. In his Tortious Discharge Complaint, Green alleged that he was terminated in retaliation for having conducted the internal investigation pertaining to the Automated Test Equipment. Specifically, Green alleged that he was "terminated in retaliation for [his] having brought to the attention of Chuck DeVito, Security Manager, double charging for equipment incident to the U.S. Airforce [sic] Contract for the purchase of Automated Test Equipment." [Tortious Discharge Complaint, ¶ 8.]

9. At his deposition in the tortious discharge action, Green testified as follows:

(a) that his investigation had concerned a particular component of the Automated Test Equipment known as the "Digital Word Generator" or "DWG." [Green Deposition at 140:22-141:25, attached as Ex. B to Roberts Declaration (hereinafter "Green Depo. at ____)."]

(b) that, according to his investigation, Northrop had purchased twenty-six of these DWGs from a subcontractor known as Autek Corporation. [Green Depo. at 142:7-14.]

(c) that these twenty-six DWGs did not work and Northrop was aware of this fact. [Green Depo. at 148:1-3.]

(d) that Northrop had double-charged the government for these components by purchasing additional items to replace the non-working DWGs. [Green Depo. at 142:7-143:7, 148:10-23.]

(e) that Northrop "renamed" the replacement components "DTMs" or "Digital Test Modules," and charged them to the same government contract. [Green Depo. at 142:7-143:7, 148:10-23.]

(f) that he was familiar with the *qui tam* lawsuit for violation of the False Claims Act and that, although he had not yet taken any

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action, he had considered the possibility of filing a such a lawsuit against Northrop. [Green Depo. at 281:19-282:19.]

10. On April 16, 1990, Green entered into the "Settlement Agreement and General Release" (hereinafter "General Release, ¶ ____"), an unambiguous, integrated[1] agreement in which he released all claims against Northrop, its employees and the others released therein. Green received $190,000 in consideration for his executing this mutually-negotiated, bargained-for General Release. [Settlement Agreement and General Release, attached as Ex. C to Roberts Declaration.]

11. Green was represented by and consulted with counsel of his choosing during the negotiation of the General Release. [Roberts Declaration (filed June 22, 1992), ¶¶ 4-8.]

12. Paragraph 8 of the General Release provides, in part, as follows:

> "Green does hereby release, acquit and forever discharge Northrop, its successors, predecessors, subsidiaries, parents, shareholders, partners, employees, agents, officers, directors, attorneys and insurers from any and all claims, expenses, debts, demands, costs, contracts, liabilities, rights to payment, obligations, actions and causes of action of every nature, under any theory under the law, whether common, constitutional, statutory or other of any jurisdiction, foreign or domestic, whether known or unknown, whether in law or in equity, which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters from the beginning of time to the present, including, but not limited to, those arising out of or relating to the [tortious discharge] Action and/or Green's employment with and separation from Northrop."

[General Release, ¶ 8.]

13. After signing the General Release on or about April 16, 1990, Green filed the present *qui tam* action for violation of the False Claims Act against Northrop, Norm Bussard ("Bussard"), Lee Lane ("Lane"), Sam McCutcheon and Autek Corporation. [False Claims Act Complaint.]

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[1]The agreement contained an explicit merger clause at Paragraph 17.

14. Bussard was an employee at Northrop during the time period covered by the allegations against him in the False Claims Act Complaint and remains an employee at Northrop's Defense Systems Division. [False Claims Act Complaint, ¶ 9.]

15. Lane was an employee at Northrop during the time period covered by the allegations against her in the False Claims Act Complaint. [False Claims Act Complaint, ¶ 14.]

16. In his False Claims Act Complaint, Green alleges that Northrop submitted false claims to the government for costs associated with the procurement of Automated Test Equipment under the B-2 Contract. [False Claims Act Complaint, ¶ 16.]

17. Also in his False Claims Act Complaint, Green alleges that Northrop: defrauded the government by submitting false claims for DWGs which failed to conform to government requirements; secretly and knowingly substituted the defective and non-conforming DWGs in place of the equipment for which the government had contracted; submitted false claims for payment for the twenty-six DWGs; and billed the government for an additional set of conforming DWGs which Northrop had "renamed" "Digital Test Modules." [False Claims Act Complaint, ¶¶ 44-46, 52, 54, 56-57.]

18. The allegations in the False Claims Act Complaint are related to the investigation Green conducted prior to his termination at Northrop, which investigation is described in Paragraphs 8 and 9, *supra*. [False Claims Act Complaint, ¶ 8.]

19. After conducting its own intensive investigation and study of the allegations in Green's False Claims Act Complaint, the government declined to intervene in this *qui tam* action. [Roberts Declaration (filed June 22, 1992), ¶¶ 9-10.]

B. Conclusions of Law

1. Whether a contract is clear and unambiguous is a question of law that may be resolved on a motion for summary judgment. *Edison v. Reliable Ins. Co.*, 664 F.2d 1130, 1131 (9th Cir. 1981); *accord Orkin Exterminating Co. v. Federal Trade Commission*, 849 F.2d 1354, 1360 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989); *Freeman v. Continental Gin Company*, 381 F.2d 459, 465 (5th Cir. 1967).

2. Under federal common law, contractual disputes are resolved by the text of the integrated contract itself, and extrinsic evidence is admitted only if the actual text is ambiguous. *See Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge, No. 1450*, 827 F.2d 1324, 1327 (9th Cir. 1987); *accord Keel v. Group Hospitalization Medical Services*, 695 F. Supp. 223, 229 n. 19 (E.D. Va. 1988); *Evans v. Safeco Life Insurance Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990).

3. Under California law, extrinsic evidence is admitted only where the language of the agreement is reasonably susceptible to the meaning urged by the party proffering such evidence. *See Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 871 (9th Cir.), *cert. denied*, 444 U.S. 981 (1979) (applying California law); *see also Oakland Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd.*, 243 Cal.Rptr. 300, 305, 197 Cal.App. 3d 1049 (1988).

4. The General Release clearly and unambiguously released all claims that Green had or held against Northrop, its employees and the others released therein, including the statutory right to payment he seeks to recover under the False Claims Act in this *qui tam* action.

5. Federal common law is applied to determine whether an agreement releases a federal cause of action, even where the agreement states that it is to be interpreted under the laws of a particular state. *Petro-Ventures, Inc., v. Takessian*, No. 90-55349, 92 Daily Journal D.A.R. 8513 (9th Cir. June 22, 1992). *See also Salmeron v. United States*, 724 F.2d 1357, 1361 (9th Cir. 1983) (construing release of claim for civil rights and constitutional violations). In any case, because the General Release is unambiguous and integrated, and because Green's proposed extrinsic evidence is proffered solely for the purpose of giving the General Release a construction to which its language is not reasonably susceptible, the extrinsic evidence he offered in opposition to the summary judgment motion is inadmissible whether federal common law or California law governs the interpretation of the General Release.

6. Moreover, because Green was aware of his potential *qui tam* action against Northrop, the burden fell to him to exclude it from the scope of the General Release; as he failed to do so, the General Release is presumed to include his right to payment in this *qui tam* action. *See Edward v. Comstock Ins. Co.*, 205 Cal.App.3d 1164, 1169, 252 Cal.Rptr. 807 (1988).

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7. Since the government has elected not to intervene in this *qui tam* action and remains free to reconsider its decision pursuant to 31 U.S.C. § 3730(c)(3), there are no public policy considerations which would bar the enforcement of the General Release. On the contrary, public policy strongly favors the enforcement of "ironclad and enforceable general releases." *Winet v. Price*, 4 Cal.App.4th 1159, 1173, 6 Cal.Rptr.2d 554 (1992).

8. Furthermore, in order to bring a *qui tam* action under § 3730(b), a relator must have standing under Article III of the Constitution. *See Hyatt v. Northrop Corp.*, No. CV 87-6892 KN (C.D. Cal. Dec. 27 1989), Slip. op. at 6.

9. In signing the General Release, Green bargained away his right to payment under the False Claims Act, as well as any right to employment by Northrop, and, thus, he lost any standing he might have otherwise had to bring a *qui tam* action against Northrop, its employees and the others released therein.

10. There is no genuine issue as to any fact material to their Motion for Summary Judgment; thus, Defendants Northrop, Bussard and Lane are entitled to summary judgment on the grounds that Green has released all claims he had or held against them and thus lacks standing to pursue this action. *See Coleson v. Inspector General of Dept. of Defense*, 721 F. Supp. 763, 769 (E.D. Va. 1989) (summary judgment mandated where there was no genuine issue of material fact as to the effect of the release contained in the settlement).

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Dated: 7-15-92 /s/ RICHARD A. GADBOIS. JR.

THE HONORABLE RICHARD G. GADBOIS, JR.
United States District Judge

Submitted by:

MUNGER, TOLLES & OLSON
BRAD. D. BRIAN
D. BARCLAY EDMUNDSON
GARY D. ROBERTS

By: /s/ Gary D. Roberts

Attorneys for Defendants
Northrop Corporation and
Norm Bussard

NO. 92-56392

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel.
MICHAEL E. GREEN,
Plaintiff-Appellant,

v.

NORTHROP CORPORATION; NORM BUSSARD,
Defendants-Appellees.

ORDER

DC NO. CV-91-0177-RG

Before: JUDGES D.W. NELSON, REINHARDT and BRUNETTI, Circuit Judges

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Reinhardt and Brunetti voted to reject the suggestion for rehearing en banc, and Judge D.W. Nelson so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R.App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

STAMPED: FILED
JAN 19 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) **Liability for certain acts.** Any person who —

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that —

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined**. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information —

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) **Claim defined.** For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portio of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other cipient for any portion of the money or property which is requested o emanded.

(d) **Exemption from disclosure.** Any information fur ed pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) **Responsibilities of the Attorney General.** The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.**

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall —

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to qui tam actions.**

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as —

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all

deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) **Award to qui tam plaintiff.**

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or

administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of

the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) **Certain actions barred.**

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **Fees and expenses to prevailing defendant.** In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought —

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final

judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) **Actions under section 3730.** Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) **Claims under state law.** The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands

(a) **In general.**

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person —

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall —

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall —

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall —

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) **Protected material or information.**

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving

of any oral testimony if such material, answers, or testimony would be protected from disclosure under —

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) **Service; jurisdiction.**

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) **Service upon legal entities and natural persons.**

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j)

may be made upon a partnership, corporation, association, or other legal entity by —

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by —

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) **Proof of service.** A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) **Documentary material.**

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by —

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) **Interrogatories**. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by —

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) **Oral examinations.**

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing

waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) **Custodians of documents, answers, and transcripts.**

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained.

Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe —

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and —

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly —

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) **Judicial proceedings.**

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such

person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed —

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand

requiring production of any such product of discovery. Any petition under this subparagraph must be filed —

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) **Disclosure exemption.** Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) **Definitions.** For purposes of this section —

(1) the term "false claims law" means —

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes —

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

No. 95-1730

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

NORTHROP GRUMMAN CORPORATION and NORM BUSSARD,

Petitioners,

vs.

UNITED STATES *EX REL.* MICHAEL E. GREEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals had authority to create a federal common law rule that a private party's release of bringing a claim under the *qui tam* provisions of the False Claims Act is unenforceable unless the United States has knowledge or consents, where there is a "gap" in the False Claims Act pertaining to the enforceability of pre-filing releases without the United States' knowledge or consent.

2. Whether a purported release of a claim under the *qui tam* provisions of the False Claims Act affected the "rights and obligations of the United States" so that "uniquely federal interests" are implicated requiring a federal court to create a uniform federal common law to displace state law.

PARTIES TO THE PROCEEDING

The petitioners are incorrect when they assert that "The United States is not a party before this Court." Petition at p. ii ("Pet"). In fact, the United States is *always* a real party in interest in a lawsuit arising under the False Claims Act, even when the action was initiated by a private person pursuant to 31 U.S.C. Section 3730(b)(1). *See United States ex rel. Milam v. University of Tex. M. D. Anderson Cancer Center*, 961 F.2d 46, 50 (4th Cir. 1992). The False Claims Act mandates that an action brought by a private person under the *qui tam* provisions of the False Claims Act "shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1).

The United States was listed as a party in the underlying appeal, as well as in the district court. Moreover, presuming that the writ of certiorari is denied or that the Court of Appeal judgment is otherwise affirmed, and the respondent obtains a settlement or favorable judgment below of the claims arising under the False Claims Act, then the United States will be entitled to a substantial percentage of such a claim. *See* 31 U.S.C. § 3730(d). Because the United States is a real party in interest in the pending litigation, it must be included along with Michael Green as the respondent in this action. Fed. R. Civ. Proc. 17(a) ("Every action shall be presented in the name of the real party in interest. . . . [W]hen a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.").

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Respondent respectfully prays that the Court deny the petition for writ of certiorari filed by petitioners Northrop Grumman Corporation ("Northrop") and Norman Bussard (hereinafter collectively "petitioners") to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF THE CASE

Petitioners incorrectly assert that it was "undisputed" that the release executed in this case did not prevent the United States or another *qui tam* relator from pursuing a separate False Claims Act ("FCA" or "the Act") action containing the allegations made by the respondent. Pet. at 3, 22. With respect to the United States, the Court of Appeals found that to permit a pre-filing release without the United States' knowledge or consent would frustrate one of the central objectives of the FCA, namely, to provide an incentive for private persons to file suit so that the Government could learn of the fraud in the first place. App. at 17a.[1] Additionally, the Court of Appeals correctly noted that the United States would not have *learned* of the fraud alleged herein without the filing of this action. *Id.* at 19a.

Likewise, petitioners incorrectly contend that enforcement of the release would not prevent another *qui tam* plaintiff from bringing the same allegations of fraud as respondent. As recognized by the Court of Appeals, the respondent "publicly disclosed" the allegation of fraud in his wrongful termination suit in state court within the meaning of 31 U.S.C. Section 3730(e)(4)(A). App. at 20a. Because no one other than Green would have "had a hand in the public disclosure of allegations" of the present FCA lawsuit, *Wang v. FMC Corp.*, 975 F.2d 1412,

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1. All references to the underlying decision of the Court of Appeals shall be made to the Petition, Appendix A ("App.").

1418 (9th Cir. 1992), "there may be no other *qui tam* relator who could bring an action based upon the allegations made by Green." App. at 20a. Additionally, no other person could later file suit alleging the same FCA claims as being made herein. *See* 31 U.S.C. § 3730(b)(5).

Petitioners also mistakenly assert that the Court of Appeals "assumed the correctness of the district court's finding that, by entering into the release as part of the settlement of the state court action, respondent had bargained away his right to bring a *qui tam* action." Pet. at 3. Rather, for "purposes of analysis," the Court of Appeals *assumed*, pursuant to *petitioners' theory*, that the release encompassed respondent's right to bring a *qui tam* action as well as a recovery that might flow from that action. App. at 4a.

In fact, Michael Green disputed that he ever intended to release the *qui tam* action or that the release barred his ability to bring the same in both the district court and the Court of Appeals. *Id.* at 4a. Although the district court concluded that the settlement agreement included a release of Green's right to bring a *qui tam* action, the Court of Appeals never addressed that issue because it held that the respondent's right to bring a *qui tam* action could not be released as a matter of federal common law. *Id.* at 5a n.3 (*citing Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982)).

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision to bridge a "gap" in the FCA by applying federal common law to hold that a pre-filing release is not enforceable without the knowledge or consent of the United States is entirely consistent with this Court's prior decisions that a uniform federal rule of decision is necessary to protect a "uniquely federal interest" where the rights and

obligations of the United States are involved. The petition for a writ of certiorari falls well short of establishing a sufficient justification for this Court to review the Court of Appeals' decision. Petitioners rely upon authority which does not discuss the FCA and where the interests of the United States were *not* involved. Accordingly, respondent respectfully submits that the petition must be denied.

I.

THE COURT OF APPEALS' APPLICATION OF FEDERAL COMMON LAW TO THE FALSE CLAIMS ACT WAS PROPER BECAUSE THE ACT IS SILENT AS TO THE EFFECT OF PRE-FILING RELEASES.

A. The FCA Is Completely Silent As To Whether A Pre-Filing Release Without The Government's Knowledge Or Consent Is Valid.

The Court of Appeals correctly found that the "FCA is silent as to the enforceability of a pre-filing release of a *qui tam* claim." App. at 7a. Congress has decided, however, that a *qui tam* action, once filed, "may be dismissed only if the court and the Attorney General give written consent to the dismissal and the reasons for consenting." 31 U.S.C. § 3730(b)(1).

The petitioners erroneously contend that the Court of Appeals *supplemented* the detailed and comprehensive FCA statutory scheme with federal common law. Pet. at 10. However, as properly recognized by the Court of Appeals, the issue in the present case simply was *not* contemplated by Congress when it amended the *qui tam* provisions of the FCA in 1986. *See* App. at 9a ("Given the lack of any textual answer to this question or any relevant legislative history, we have no basis for inferring that Congress intended the release at issue to be enforceable or

unenforceable. Congress' silence on the matter of pre-filing releases could reflect just as reasonably its failure to contemplate the issue, its desire to leave the resolution of the issue to the courts, its approval of such pre-filing releases, or its determination that Government consent is required.").

The Court of Appeals further recognized that the issue in the present case was distinguishable from the cases relied upon by the petitioners where a statute expressly provided for a remedy or a defense and the court was reluctant to provide any additional remedy or defense.[2]

Because the False Claims Act is silent as to pre-filing releases, the analysis then turns to which law should be used to bridge this "gap." *See, e.g., Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").

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2. The Court of Appeals found that the canon of statutory construction "*inclusio unius, exclusio alterius*" relied upon by the petitioners herein (*see* Pet. at 9) "simply is not relevant to the resolution of the question presented in this case. In the cases in which the canon has traditionally been applied, the question has been whether the statute at issue permits an implied right of action." App. at 8a.

This canon has been defined as "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). However, this canon "has its limits and exceptions and cannot apply when the legislative history and context are contrary to such a reading of the statute," *United States v. Castro*, 837 F.2d 441, 492-43 (11th Cir. 1988), as it is merely a rule of interpretation, and *not* a rule of law. *See Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992).

B. This Court Has Consistently Held That Where The Rights And Obligations Of The United States Are Involved, A Federal Rule Of Decision Is Necessary To Protect Uniquely Federal Interests.

Where Congress has not spoken in an area concerning federal interests, this Court has consistently held that federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (*quoting Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Describing the task as "difficult," *Kimbell Foods*, 440 U.S. at 727, the Supreme Court has stated that the decision whether to adopt state law or to fashion a nationwide federal rule to resolve a controversy not addressed by Congress is "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947).

Although this Court has held that matters left unaddressed in a comprehensive and detailed statutory scheme "are *presumably* left subject to disposition provided by state law," *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994) (citations omitted) (emphasis added), this presumption is rebuttable because this Court "also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States...." *Northwest Airlines, Inc. v. Transport Workers' Union*, 451 U.S. 77, 95 (1981) (*citing Clearfield Trust*, 318 U.S. at 366-67; *Miree v. DeKalb County*, 433 U.S. 25, 31-32 (1977); *Standard Oil*, 332 U.S. at 316). Thus, where the rights and obligations of the United States are involved, this Court has consistently held that a federal

common law must be uniformly applied, thereby preempting the use of state law.

Application of a uniform federal common law has extended to situations involving the contractual relations of the United States, *see Clearfield Trust*, 318 U.S. at 366 (this Court held that the "rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law."), as well as situations affecting the liability of the United States or the liability of entities who have contractual relations with the United States. *See, e.g., Standard Oil*, 332 U.S. at 305-06 ("The scope, nature, legal incidents and consequences of the relation between persons in [military] service and the Government are fundamentally derived from federal sources and governed by federal authority.") (citation omitted); and, *Boyle v. United Technologies Corp.*, 47 U.S. 500, 506-07 (1988) (holding that "The imposition of liability on Government contractors will directly affect the terms of Government contracts. . . . [T]he interests of the United States will be directly affected.");

The fact that federal law must be applied to govern the rights and duties of the United States finds its basis in the United States Constitution. *See* U.S. Const., art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."); *see also Clearfield Trust*, 318 U.S. at 366 ("When the United States disburses its funds or pays it debts, it is exercising a constitutional function or power.").

In the present case, it is plain that enforcement of the FCA is germane to the "rights and obligations of the United States" as it was the "objective of Congress" in passing the FCA "to protect the funds and property of the Government from fraudulent claims. . . ." *Rainwater v. United States*, 356 U.S. 590, 592 (1958); *see also United States ex rel. Marcus v. Hess*, 317 U.S.

537, 551 (1943) ("The chief purpose of [the FCA]. . .was to provide the restitution to the Government of money taken from it by fraud. . . .").[3]

The FCA is clearly related to the "uniquely federal interests" of the Government to recoup fraudulently-paid public monies. *See, e.g., Standard Oil*, 332 U.S. at 306 (holding that where "the Government's purse is affected" a sufficient basis exists "for excluding state intrusion.").[4] Where the question is "one of federal fiscal policy," it is *not* of "special or peculiar concern to the states or their citizens." *Standard Oil*, 332 U.S. at 311.

The *qui tam* provisions of the FCA are "intended to encourage those with knowledge of a fraud to come forward," *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994) (citation omitted), *cert. denied*, 115 S. Ct. 1110 (1995), and "to promote private citizen involvement in exposing fraud against the Government. . . ." *United States ex rel. Radushka v. Crane Co.*, 40 F.3d 1509, 1511 (8th Cir.) (citation omitted), *cert. denied*, 115 S. Ct. 2579 (1994); *see also United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir.), *cert. denied*, 114 S. Ct. 1125 (1993) ("The entire purpose of the FCA's qui tam provisions is to employ the help of individuals to uncover fraud against the Government.").

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3. This Court has further indicated that the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government," *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *see also* S. Rep. No. 99-345, 99th Cong., 2d Sess. 9 (1986) (The Senate Report to the 1986 FCA Amendments makes clear that the Act "is intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services.").

4. *See also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973) ("when transactions of the Federal Government are involved . . . . the Constitution or Acts of Congress require otherwise than that state law governs of its own force.") (footnote omitted).

The "relationship" between the United States and a *qui tam* plaintiff is contractual: "The FCA effectively assigns the Government's claims to *qui tam* plaintiffs. . . , who then may sue based upon an injury to the federal treasury. Under this theory of standing, *the FCA's qui tam provisions operate as an enforceable unilateral contract.*" *Kelly*, 9 F.3d at 748 (emphasis added).

Because of the contractual relationship between the United States and a *qui tam* plaintiff, coupled with the underlying purpose of the FCA to recoup money paid out by the Government as a result of fraud, the *qui tam* provisions of the FCA also serve a "uniquely federal interest" of helping the United States recoup its monies paid as a result of fraud.

The identification of a "uniquely federal interest" establishes a "necessary . . . condition for the displacement of state law." *Boyle*, 487 U.S. at 407. *Boyle* indicates that displacement of state law "will occur where a significant conflict exists between an identifiable federal policy or interest in the operation of state law or the application of state law would frustrate specific objectives of federal legislation. . . ." *Id.* *Boyle* recognized, however, that the conflict between state and federal law "need not be as sharp" where Congress legislates in areas, such as the FCA, that have *not* been traditionally occupied by the states. *Id.* (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, where the "uniquely federal interest" requires a uniform rule, the entire body of state law applicable to the area conflicts and must be replaced by federal rules. *Id.* (*citing Clearfield Trust*, 318 U.S. at 366-67).

In the present case, the Court of Appeals correctly applied the factors set out in *Kimbell Foods*[5] and held that it was

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5. These factors include: (1) whether the issue requires a national uniform body of law; (2) whether the application of state law would frustrate (Cont'd)

"appropriate to fashion a uniform federal common law rule to determine the validity of [pre-filing] releases. . . ." App. at 12a.

First, the Court of Appeals recognized that "[u]pholding the release at issue in this case would frustrate the policies underlying the *qui tam* provisions of the FCA." App. at 11a.[6] Because the rights or obligations of the United States are involved in a FCA case, including matters pertaining to the public fisc, a uniform federal common law rule was necessary to displace state law.[7]

(Cont'd)
specific objectives of the federal program; and (3) whether application of a federal rule would disrupt commercial relationships predicated on state law. App. at 10a-11a (*quoting Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986) (*quoting Kimbell Foods*, 440 U.S. at 728-29)).

6. The Court of Appeals also recognized that *O'Melveny* did not purport to overrule this Court's decision in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), which held that federal rights easily could be defeated if federal law did not ultimately control the question of the validity of a release. App. at 9a-10a n. 4 (*citing Dice*, 342 U.S. at 361).

7. *See, e.g., Clearfield Trust*, 318 U.S. at 367 ("The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of law rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great perversity and results by making identical transactions subject to the vagaries of the laws of the several states. *The desirability of a uniform rule is plain.*") (emphasis added); *see also Standard Oil*, 332 U.S. at 310-311 (The Government's right to be indemnified for injury to military service personnel by third parties affects the ability "to make whole the federal treasury for financial losses sustained. . . . [a]nd because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition . . . they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.").

Second, the Court of Appeals also determined that application of state law in the present case would frustrate the specific objectives of the FCA. App. at 11a. Specifically, the Court of Appeals determined that there was a "distinct possibility" that a state would unduly emphasize the interest favoring enforceable releases over the interests of the United States. *See id.* (citation omitted). Additionally, the Court of Appeals felt that it was necessary to apply a uniform federal rule "to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of the state that is most likely to uphold the release." *Id.* (*citing Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992) (which held that a settlement agreement purporting to waive a federal securities claim is governed by federal law even when it contains a choice-of-law claim because "federal statutory rights could be easily defeated if state law could be used to control the incentives of those rights and the defenses of them." (internal quotation omitted)).

Lastly, the Court of Appeals held that "applying a uniform federal rule will not disrupt commercial relationships that are predicated on state law." *Id.* In fact, the Court of Appeals flatly rejected petitioners' argument below that a government contractor like Northrop will not be able to fully settle employee-related disputes. *Id.* at 23a-24a.

Thus, the Court of Appeals correctly determined that application of a uniform federal common law was justified in light of the underlying legislative policy of the *qui tam* provisions of the FCA and the "uniquely federal interests" of the United States embodied therein.[8]

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8. The petitioners do not assert herein that the Court of Appeals erred in applying the "balancing test" of the federal common law rule set forth in *Town of Newton v. Rumery*, 480 U.S. 386 (1987) that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*, 480 U.S. at 392 (citations and footnote omitted).

II.

THE AUTHORITY RELIED UPON BY PETITIONERS IS READILY DISTINGUISHABLE FROM THIS FCA CASE.

A. Petitioners' Brief Fails To Cite To Any Applicable Authority Interpreting the False Claims Act.

Respondents respectfully submit that certiorari must be denied because the petitioners have simply misapplied this Court's relevant authority to determine whether or not the Court of Appeals correctly fashioned a uniform federal common law holding that a pre-filing release of a FCA claim is unenforceable without the United States' knowledge or consent. Perhaps the most telling factor is the conspicuous omission by the petitioners of *any case authority discussing the FCA*, save for one isolated case.[9] The nonexistent reliance upon FCA case authority manifestly demonstrates that the cases upon which petitioners rely are readily distinguishable from the present case.

B. *O'Melveny* Does Not Require Reversal Of The Court of Appeals' Decision.

Moreover, the Supreme Court authority relied upon by the petitioners do not serve as a basis for reversing the Court of Appeals' well-founded and careful decision rendered in this case. The prime example of this fact is petitioners' overstated and misguided reliance on *O'Melveny*.

In *O'Melveny*, the Federal Deposit Insurance Corporation

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9. Petitioners' citation to *Mortgages, Inc. v. United States District Court*, 934 F.2d 209 (9th Cir. 1991), was for the sole purpose of indicating that the FCA is a detailed and comprehensive federal scheme, which the Court of Appeals in this action so found. App. at 10 n. 3.

("FDIC"), as receiver for a failed savings and loan ("S&L"), sued the S&L's former counsel for state law claims of legal malpractice and breach of fiduciary duty. The law firm successfully moved for summary judgment contending that the FDIC was estopped from filing suit because the FDIC "stood in the shoes" of the S&L to whom the wrongdoing of S&L insiders was attributable. This Court ultimately vindicated the district court's ruling, and reversed the court of appeals, by holding that the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) created federal rules "regarding claims by, and defenses against, the FDIC, as receiver. . . ," and, as a result, federal common law could not be invoked to create an exception to the defenses against the FDIC as listed in FIRREA. *O'Melveny*, 114 S. Ct. at 2053-54.

However, *O'Melveny* recognized that the creation of a federal common law rule *is warranted* in situations where Congress has not acted and "there is a 'significant conflict between some federal policy or interest in the use of state law'" *Id.*, 114 S. Ct. at 2055 (*quoting Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Assuming FIRREA was inapplicable, *O'Melveny* decided that the FDIC had not identified any "significant conflict with an identifiable federal policy or interest" or that the "primary conduct of the United States or its agents or contractors" was involved sufficient to displace state law, because the FDIC's rights and liabilities were only as a receiver to the failed S&L. *Id.*

What distinguishes the present case from *O'Melveny* is that, here, a contract *exists* between the United States and the *qui tam* plaintiff, *see Kelly*, 9 F.3d at 748, such as to invoke the rights and obligations of the United States and, thereby, require uniform application of a federal common law where Congress has not expressly acted. *See Boyle*, 47 U.S. at 504-05 ("We have held that obligations to and rights of the United States under its

contracts are governed exclusively by federal law.") (citations omitted)).

The other Supreme Court cases relied upon by the petitioners either involve situations where this Court was reluctant to include an implied remedy or defense where Congress had already provided an explicit remedy or defense[10] or, where Congress was silent on the matter, state law could be applied because there was neither a significant conflict between state and federal law or there was no need for a uniform body of federal common law.[11]

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10. *See, e.g., O'Melveny*, 114 S. Ct. at 2054; *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981) (the Court refused to supplement the remedies provided for in the federal antitrust laws with a claim for contribution); *Northwest Airlines*, 451 U.S. at 93 ("The comprehensive character of the remedial scheme[s] expressly fashioned by Congress [under the Equal Pay Act and Title VII] strongly evidences an intent not to authorize additional remedies" including a claim for contribution) (footnote and citations omitted); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1973) (Court held that federal common law could not impose more stringent effluent standards than those set forth in the Federal Water Pollution Act Amendments); and, *Mobil Oil*, 436 U.S. at 625 (the Court refused to supplement the remedies provided for by The Death On The High Seas Act with a claim for loss of society).

11. *See, e.g., Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98-99 (1991) (the Court held that because corporations are "creatures of state law," "[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that the rights and obligations would be governed by state-law standards.") (citations omitted); and *Kimbell Foods*, 440 U.S. at 729-30 (holding that a uniform national rule was unnecessary to protect the federal interests underlying the Small Business Administration and the FHA loan programs because the SBA operations were "specifically and in great detail adapted to state law," and that the "federal interest in supplanting important and carefully evolved state arrangements designed to serve multiple purposes was minimal.") (internal quotations and citation omitted).

C. Congress Has Manifested Its Intent That A *Qui Tam* Plaintiff and Defendant Cannot Settle or Dismiss a FCA Claim Without The United States' Consent.

Perhaps recognizing that the Court of Appeals' decision to apply federal common law in the present case was consistent with applicable Supreme Court authority, the petitioners next make the unsupportable contention that the Court of Appeals' decision nevertheless conflicts with the recent opinion of this Court in *United States v. Mezzanatto*, 115 S. Ct. 797 (1995). *See* Pet. at 15-16.

In *Mezzanatto*, this Court held that a criminal defendant's agreement to waive the exclusionary provisions of plea-statement rules set forth at Federal Rules of Evidence 410 and Federal Rules of Criminal Procedure 11(e)(6) were presumably subject to waiver "absent some affirmative indication of Congress' intent to preclude waiver." *Mezzanatto*, 115 S. Ct. at 801. This was especially so in *Mezzanatto* because "[a]bsent some 'overriding procedural consideration that prevents enforcement of the contract,' courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objection." *Id.*, 115 S. Ct at 802 (citation omitted).

Here, however, the only indication of the legislative intent of Congress concerning the ability of the *qui tam* plaintiff and the defendant to settle is that they cannot agree to settle or dismiss a pending FCA claim unless "the court and the Attorney General give written consent to the dismissal and the reasons for consenting." 31 U.S.C. § 3730(b)(1). Because of this express provision, the Court of Appeals opined that, "It may be more consistent with the enforcement scheme set up by Congress to prevent parties from releasing the [FCA] remedy without first

obtaining the government's consent." App. at 8a.[12]

Because the FCA evidences Congress' intent that the United States' must approve the settlement or dismissal of a pending FCA claim, the present case is distinguishable from the circumstances in *Mezzanatto*, where no congressional intent was present.

D. No Conflicts Exist Between The Court Of Appeals' Decision And The Decision of Other Courts.

The petitioners also attempt to manufacture a purported appearance of conflict between the Court of Appeals' opinion herein and decisions from other circuits. Again, however, the glaring weakness of petitioners' argument is that *none* of the cases from the other circuits remotely concern the FCA. *See* Pet. at 12-15, 27-28.

In order to invoke the jurisdiction of this Court, the petitioners were required to affirmatively establish that the Court of Appeals in this case "entered a decision in conflict with the decision of another United States court of appeals *on the same important matter...*" Sup. Ct. R. 10(a) (emphasis added). Instead, as noted above, the Court of Appeals' decision to apply a uniform federal common law to pre-filing releases under the FCA is entirely consistent with this Court's precedent. Thus, no conflict exists between the Court of Appeals' decision in this

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12. Moreover, *Mezzanatto* did not purport to overrule this Court's earlier decision in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which held that certain statutory entitlements guaranteed to employees by the Fair Labor Standards Act were not subject to waiver because the structure and legislative history of the Act evinced a "legislative policy" of "prevent[ing] private contracts" on such matters. *Id.*, 324 U.S. at 706.

case and cases from other Court of Appeals as cited by the petitioners.[13]

E. Principles Of *Res Judicata* Do Not Bar This FCA Claim.

Lastly, this Court should not grant certiorari on petitioners' tortured contention that *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996), provides an "alternative basis" for concluding that the Court of Appeals erred in this case. Pet. at 25 n. 12. Petitioners' reliance on *Matsushita* is simply misplaced because if the release of the FCA claim was unenforceable in the first place — as decided by the Court of Appeals — the state court could not have dismissed this claim. Moreover, Northrop has failed to demonstrate that a "judgment" was actually entered in the state court action herein; rather, Green agreed to voluntarily dismiss his state law claim for wrongful termination after consummating the settlement with petitioner Northrop.

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13. Likewise, this Court's jurisdiction should not be invoked for the argument set forth by the petitioners that "[m]ore generally, this case provides an appropriate vehicle for providing much needed guidance on the broader question 'whether state law should be adopted as the federal rule of decision to govern the enforceability of settlement agreements' that cover federal claims...." Pet. at 28. Again, none of the cases cited at page 28 of the petition remotely involve cases interpreting the FCA. Thus, pursuant to Rule 10 of this Court, there does not exist a conflict concerning the "same important matter." Sup. Ct. R. 10(a).

CONCLUSION

Based on the foregoing, respondent respectfully prays that the petition for writ of certiorari must be denied.

Dated: May 24, 1996

Respectfully submitted,

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No. 95-1730

In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION
AND NORM BUSSARD,
Petitioners,
v.
MICHAEL E. GREEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Respondent's Brief in Opposition confirms the need for review by this Court. With respect to the first issue raised by the petition, respondent simply cannot distinguish this Court's decisions in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), and *United States v. Mezzanatto*, 115 S. Ct. 797 (1995); under either decision, the Ninth Circuit's decision is clearly wrong. As to the second issue, respondent all but concedes that the Ninth Circuit erred in failing to identify a "uniquely federal interest" that was implicated in this case, and his effort to provide a post-hoc justification for the Ninth Circuit's decision is wholly unavailing. Finally, respondent cannot reconcile the obvious conflict between the Ninth Circuit's expansive construction of its authority to create federal common law and the far more restrictive approach applied in other circuits; his only suggestion for harmonizing the cases is to point to the irrelevant fact that the other circuit court cases did not involve claims under the False Claims Act ("FCA").

A. A Comprehensive Federal Statutory Scheme Cannot Be Supplemented With Federal Common Law Rules

Despite respondent's confused and conflicting attempts to justify the result reached by the Ninth Circuit, the court's creation of federal common law under the circumstances presented here simply cannot be reconciled with this Court's precedents. As explained in the petition, this Court repeatedly has made clear that where Congress has enacted a comprehensive and detailed statutory scheme, courts are not free to supplement the statute with federal common law. Pet. at 7-8. The Ninth Circuit clearly departed from this well-settled principle by employing "federal common law" effectively to amend the FCA's comprehensive legislative scheme by adding an entirely new provision — "that prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." Pet. App. at 24a.

1. Respondent's Argument That Congressional Silence Empowers The Courts To Create Federal Common Law Flies In The Face Of This Court's Precedents

Respondent first tries to justify the Ninth Circuit's federal common law rule by claiming that it does not "supplement" the FCA at all, but merely fills a "gap" with respect to an issue on which the

statute is silent. Opp. at 3-4. The factual premise of this argument — that the statute is "silent" on the issue presented here but that creating a federal common law rule to resolve the issue is not "supplementing" the statute — is pure semantics at best. Indeed, it is hard to imagine what word other than "supplement" could be used to describe the court's creation, from whole cloth, of an entirely new federal common law rule that adds significant and entirely nontextual substantive provisions to a federal statute.

Equally unavailing is respondent's argument that, because Congress purportedly did not "contemplate" the issue of prefiling releases in the FCA, the Ninth Circuit was authorized to add a new federal common law rule on that subject. Opp. at 3-4. *See also id.* at 5, 7 (suggesting that Congress' failure to address a particular issue in an otherwise comprehensive and detailed statute such as the FCA qualifies as an "absence of legislation" removing the case from the *Northwest Airlines/O'Melveny* framework). This line of argument repeatedly has been rejected by this Court, which has made clear that the enactment of a comprehensive statutory scheme precludes the creation of federal common law not only as to matters that Congress specifically addressed in the statute, but also as to matters that Congress, for whatever reason, did not address. *See O'Melveny*, 114 S.Ct. at 2054 ("matters left unaddressed" by a federal statutory scheme may not be supplemented by federal common law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (refusing to recognize a claim for loss of society under the Death on the High Seas Act where the statute did not address the issue).[1] Indeed, the notion that a federal court can make up its own substantive rules

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[1] Also without merit is respondent's argument that the principles discussed above apply only where the proposed rule of federal common law would create "an implied remedy or defense where Congress ha[s] already provided an explicit remedy or defense." Opp. at 13. This argument is inconsistent with the separation of powers principles that underlie this Court's cases (*see, e.g., Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981)) — principles of relative legislative and judicial competence that are not limited to the narrow area of the creation of new claims or defenses. Moreover, the argument is inconsistent with *O'Melveny* itself, which did not involve a proposed new federal common law defense, but rather a proposed federal common law rule regarding the imputation of defenses. *O'Melveny* cannot plausibly be distinguished from this case, which involves

whenever it thinks of an issue that "was not contemplated by Congress" in enacting a statute (Opp. at 3) would turn on its head the constitutional principle of separation of powers, and indeed would render the judicial power to legislate virtually limitless.

Finally, contrary to respondent's assertion, the fact that an issue not specifically addressed by a federal statute arises "in an area concerning federal interests" (Opp. at 5) does not alter the above analysis or reverse the presumption described in *O'Melveny*. This Court consistently has made clear that even "in an area of national concern" that might be appropriate for the creation of federal common law in the absence of legislation—such as the regulation of interstate disputes or admiralty — the enactment of a comprehensive statutory scheme displaces judicial power in the area; once Congress has determined the appropriate nature and extent of federal regulation in such an area, "there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981). *See also O'Melveny*, 114 S.Ct. at 2054 (refusing to "supplement" FIRREA with federal common law, despite the asserted "high federal interest in this area"); *Mobil Oil*, 436 U.S. at 625 (that admiralty is an area traditionally governed by federal common law does not justify federal common law where Congress has comprehensively legislated).

2. Respondent's Attempts To Distinguish *Mezzanatto* Are Unavailing

Far from authorizing a federal common law rule precluding any prefiling waiver of the right to sue under the FCA, Congress' acknowledged silence on the subject compels application of the settled rule that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 115 S.Ct. at 801.

In a singularly tortured effort to distinguish *Mezzanatto*, respondent suggests that where Congress has expressly limited waiver of a right and thereby reversed the *Mezzanatto* presumption under certain specified circumstances, that fact permits the courts to ignore

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a proposed federal common law rule designed to eliminate the otherwise available defense of release.

the presumption and prohibit waiver in *other* circumstances as well. Thus, he cites a provision addressing the prerequisites for dismissing a *qui tam* action *after* it is filed in court and argues that the Ninth Circuit was free to impose similar limitations on the waiver of *qui tam* rights *before* any *qui tam* suit is filed. Opp. at 14-15.

Respondent's position is both internally inconsistent and legally incorrect. His claim that Congress has "manifested its intent" to negate the *Mezzanatto* presumption in the prefiling context (Opp. at 14-15) simply cannot be reconciled with his earlier assertion that the FCA is "completely silent" on the issue of prefiling releases (*id.* at 3). Respondent cannot have it both ways. To the extent that the statute indeed is "completely silent" on the subject of prefiling releases — as the Ninth Circuit concluded and as respondent argued earlier in his analysis — *Mezzanatto* is dispositive of the issue. As for the provision addressing *post*filing releases, Congress' decision to override the *Mezzanatto* presumption only in certain specified contexts strongly confirms that it must be presumed to have intended to permit voluntary waiver in all other contexts. *See O'Melveny*, 114 S.Ct. at 2054.[2]

B. There Is No "Uniquely Federal Interest" In The Release Of A Federal Cause Of Action

1. Respondent's Inability To Defend The Ninth Circuit's Analysis Of This Issue Confirms The Need For Review By This Court

Respondent candidly concedes (as he must) that "[t]he identification of a 'uniquely federal interest' establishes a 'necessary . . . condition for the displacement of state law.' " Opp. at 8 (quoting

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[2]Respondent's claim that *Mezzanatto* "did not purport to overrule" *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), (Opp. at 15, n.12), is true, but irrelevant. In *Brooklyn Savings Bank*, the Court held that Congress, in enacting the minimum wage provisions of the Fair Labor Standards Act, intended to preclude private contracts waiving payment of the minimum wage required by the statute. *Id.* at 706-07. This conclusion makes perfect sense, given that the whole point of a minimum wage provision was to restrict the freedom to contract for a lesser wage. The Court in *Mezzanatto* thus correctly distinguished *Brooklyn Savings Bank* as a case involving a specific Congressional intent to preclude waivers. *Mezzanatto*, 115 S.Ct. at 804 n.4. No such intent is present here.

Boyle v. United Technologies Corp., 487 U.S. 500, 507 (1988)). He is unable, however, to cite any part of the Ninth Circuit's opinion that even discusses this essential requirement, much less explains how it is satisfied in this case. The reason is obvious enough: The Ninth Circuit simply ignored this crucial limitation on its authority and arrogated to itself the power to displace state law that, in its view, conflicted with federal "policy." Pet. at 19-21.

Respondent makes only a half-hearted effort to defend the ground actually relied upon by the Ninth Circuit to justify its excursion into federal common law. The court held that " 'federal law always governs the validity of releases of federal causes of action,' " and then assumed, without more, that it therefore was free to set aside any principles of state contract law that conflicted with the court's notions of FCA "policy." Pet. App. at 9a. What the Ninth Circuit failed to recognize is that even when federal common law nominally governs a field, the existence of a "uniquely federal interest" remains a necessary condition for the "displacement of federal-law reference to state law for the rule of decision." *Boyle*, 487 U.S. at 507 & n.3.

Respondent's only defense of the Ninth Circuit's analysis is to argue in a footnote that *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952), requires the application of uniform federal standards, because otherwise "federal rights could easily be defeated." Opp. at 9 n.6. However, *Dice* did *not* hold that there was a uniquely federal interest in the release of a federal cause of action. Rather, *Dice* displaced state law only because the particular statute at issue was construed to *require* the promulgation of a uniform federal-common-law rule. Pet. at 24-25. Further, although *Dice* did state, as respondent notes, that federal law "*ultimately* control[s] the question of the validity of a release," Opp. at 9 n.6 (emphasis added), that fact is insufficient to establish that there is a uniquely federal interest in the release of a federal cause of action. *Boyle*, 487 U.S. at 507 & n.3; *see also O'Melveny*, 114 S. Ct. at 2053-54.[3]

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[3]Respondent also makes the erroneous assertion that petitioners did not object to the Court of Appeals' application of *Town of Newton v. Rumery*, 480 U.S. 386 (1987), which respondent describes as having established an all-purpose "federal common law" test for determining the validity of a release. Opp. at 10 n.8. The petition notes that *Rumery*'s application of a uniform federal standard for judging the validity of a release of rights under § 1983 was based on the well-settled rule — specific to the § 1983 con-

2. Respondent's Effort To Defend The Ninth Circuit's Judgment On Other Grounds Is Wholly Unpersuasive

The bulk of respondent's opposition is devoted, not to justifying the Ninth Circuit's indefensible analysis, but to arguing that the Ninth Circuit's holding was nonetheless proper because a uniquely federal interest *was* implicated in this case. Opp. at 5-10. Respondent does not (and could not) dispute petitioners' assertion that this Court has narrowly circumscribed the range of uniquely federal interests that will justify the displacement of state law. Pet. at 20. The instant case plainly does not involve admiralty or an interstate or international dispute, and respondent's valiant post-hoc attempt to fit the case into the last remaining category — cases concerning the rights and obligations of the United States — is wholly unpersuasive.

Respondent contends that a uniquely federal interest was present here because "enforcement of the FCA is germane to the 'rights and obligations of the United States.' " Opp. at 6. This claim is unavailing for the simple reason that the rights and obligations of the United States *never were at issue in this case.* The United States was not a party to the state-court settlement entered into between Northrop and respondent, and its legal rights and obligations were in no way diminished or affected by that agreement. On the contrary, the release merely reflected the fact that, as part of the settlement of his state court wrongful discharge action, *respondent* voluntarily relinquished his *own* right to bring a suit against Northrop "under any theory under the law." Pet. App. at 32a. The release did not in any way preclude the United States (or another *qui tam* relator), either as a legal or a practical matter, from pursuing an FCA action.[4] Indeed, as the district court expressly noted, the United States

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text — that that statute must be construed in light of the general principles of the common law that were applicable at the time § 1983 was enacted. Pet. at 18 n.4.

[4]Respondent contends that an action brought by another *qui tam* relator would have been barred (1) by 31 U.S.C. § 3730(e)(4)(A) because the allegations had been "publicly disclosed" in the state court action; and (2) by 31 U.S.C. § 3730(b)(5) because the allegations were contained in the instant FCA action. Opp. at 1-2. Neither of these claims, of course, establishes that the *release* would have barred another *qui tam* relator from bringing suit.

conducted an intensive investigation and affirmatively made a decision not to pursue the allegations. Pet. App. at 33a.

Respondent contends, however, that the United States would never have learned of the allegations had this *qui tam* suit not been filed, and that the release therefore *might* have made it less likely, as a practical matter, that the government would bring a suit. Opp. at 1. This unsupported speculation overlooks the fact that respondent remained free, at all times, to communicate his allegations to the United States; it ignores the significant resources available to the government to investigate and monitor the performance of defense contractors; and it appears flatly inconsistent with respondent's frank concession (Opp. at 1) that the allegations were "publicly disclosed," within the meaning of the FCA, by their inclusion in his *state-court* action.

More importantly, respondent's point is simply irrelevant. The mere fact that a state-court global settlement might conceivably have the ultimate practical effect, through some attenuated chain of causation, of making it less likely that the government will assert its legal rights does not establish that the private settlement itself implicates "the rights and obligations of the United States" within the meaning of this Court's federal common law cases. *See Boyle*, 487 U.S. at 506 (noting that, in such circumstances, " 'any federal interest in the outcome of the [dispute]' " is " 'far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern' ") (quoting *Miree v. DeKalb County*, 433 U.S. 25, 32-33 (1977)). Indeed, given the omnipresence of the federal government in the modern economy, almost any private contract will have some practical effect on the government's rights (*e.g.*, its ability to collect taxes from the contracting parties), and if the speculative possibility of affecting the United States' ability to assert its rights were enough to implicate uniquely federal interests, then "we would be awash in 'federal common law' rules," *O'Melveny*, 114 S. Ct. at 2055.

Rather, the uniquely federal interest in the "rights and obligations of the United States" is implicated only when the state law at issue would redefine the legal rights of the United States government, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), would impose liability on federal employees for official acts, *Westfall*

v. Ervin, 484 U.S. 292, 295 (1988), or would impose liability on federal contractors for actions taken pursuant to the directions and specifications of the federal government, *Boyle*, 487 U.S. at 505-07. In each of these situations, the application of state law would permit the states either to define the substantive legal rights of the United States or to prescribe substantive standards regulating the performance of sovereign acts of the federal government. Because "the authority and duties of the United States *as sovereign* are intimately involved," *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (emphasis added), there is in each of these situations a uniquely federal interest warranting the displacement of state law. *See also Northwest Airlines*, 451 U.S. at 95 (noting that there is a uniquely federal interest in "the *definition* of rights or duties of the United States") (emphasis added).

By contrast, there is no such interest here, because the application of state contract law would neither define the substantive legal rights of the United States nor regulate the performance of a federal sovereign act. Rather, state law would merely define the legal rights of private parties who wished to settle all outstanding disputes between them in order to resolve a pending state-court action.[5]

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[5]For similar reasons, respondent's extensive reliance on the general purposes served by the FCA — such as the recoupment of "fraudulently-paid public monies" and the promotion of sound "federal fiscal policy" — is misplaced. Opp. at 7 (citation and internal quotation marks omitted). Although respondent contends that the FCA effectively creates a "unilateral contract" by which a *qui tam* relator is "assign[ed]" some of the substantive rights of the government, Opp. at 8, he overlooks the crucial fact that what is at issue here is *not* the scope of substantive governmental rights that have been "assigned" to respondent. Rather, the sole question here concerns the validity of a state-court contract under which respondent bargained away his right to receive such an "assignment" and to bring suit under the FCA. There is no "uniquely federal interest" in the ability of Michael E. Green to bring a suit under the FCA. *See Texas Industries*, 451 U.S. at 642 (noting that there is no uniquely federal interest in private rights created by federal statutes, despite the fact that vindication of these private rights "supplements federal enforcement and fulfills the objects of the statutory scheme").

C. Respondent's Effort To Downplay The Conflict Between The Ninth Circuit And Other Circuits Is Unavailing

Ignoring the fact that the Ninth Circuit's view of its authority to create federal common law is irreconcilable with that of several other circuits, respondent dismisses this split of authority on the *sole* ground that none of the cases in the other circuits involved a claim under the FCA. Opp. at 15-16. That argument would be persuasive only if there were some basis for believing that the Ninth Circuit's different approach to federal common law is *based on the FCA*. (One cannot argue away a split of authority without establishing that the proffered ground of distinction is a *relevant* one.) In this case, however, neither of the Ninth Circuit's two critical errors — *viz.*, its misapplication of *O'Melveny* and *Mezzanatto* and its disregard of the "uniquely federal interests" requirement—was rooted in principles unique to the FCA. *Cf. Matsushita Elec. Industrial Co. v. Epstein*, 116 S. Ct. 873, 877 (1996) (certiorari granted because lower courts had "taken various approaches" to determining the preclusive effect of a state court judgment that released "exclusively federal" claims; cases cited by the Court as reflecting this split involved federal claims under *different* provisions of the securities laws).

Moreover, respondent's implicit suggestion that this Court should wait for a very narrow split to emerge over the role of federal common law in releases *under the FCA* is inconsistent with this Court's interest in selecting those cases that will maximize its ability to provide guidance on unsettled legal questions that divide the lower courts. In particular, the threshold question whether to apply state law in judging the validity of a release of a federal cause of action is one that has divided the lower courts for years and has led to specific circuit splits in the context of at least three different federal statutes. Pet. at 28. There is no reason to wait for another case: This petition squarely raises that threshold question, and it therefore provides an appropriate vehicle for resolving all of these splits in a single case.[6]

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[6]Respondent objects to petitioners' suggestion that this Court's recent decision in *Matsushita* provides an alternative basis for concluding that the Ninth Circuit erred. Opp. at 16. Although respondent argues that the petitioners have failed to show that the state court proceedings were

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terminated by a "judgment," he overlooks well-established California law, which provides that a voluntary dismissal of a state court action with prejudice (as occurred here) constitutes a determination on the merits and is res judicata. *See, e.g., Roybal v. University Ford*, 207 Cal. App. 3d 1080, 1085-86 (1989); *Fisher v. Eckert*, 94 Cal. App. 2d 890, 892-94 (1940). Respondent's argument that a federal court need not give full faith and credit to a state court judgment releasing a federal claim if the federal court deems the release to be "unenforceable," Opp. at 16, is flatly inconsistent with the Full Faith and Credit Act: "Federal courts may not 'employ their own ... rules in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.' " *Matsushita*, 116 S. Ct. at 877 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). In any event, respondent's various objections would be more appropriately addressed by the lower courts after a remand for reconsideration in light of *Matsushita*. Accordingly, if this Court declines plenary review of the questions raised in this petition, then the Court should vacate the Ninth Circuit's judgment and remand the case to that court with instructions to remand the case to the district court for further proceedings in light of *Matsushita*.